PROCEEDINGS
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IN THE CITY OF NEW YORK

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THE REVISION OF THE STATE CONSTITUTION

GENERAL PRINCIPLES AND MECHANICS OF REVISION
THE STRUCTURE OF STATE GOVERNMENT

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PART I

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CONTENTS

THE PRINCIPLES AND PRACTICE OF CONSTITUTIONAL REVISION [1]

ELIHU ROOT

United States Senator from New York

THERE is an interesting parallel between the present constitutional convention and the one that preceded it. The last one ought to have occurred in 1887, twenty years after the convention of 1867. It did not please the party which happened to be in power in 1887 and for a number of years afterward to have the convention, because they could not get the arrangements just to suit them. At last, in 1892, everything was right and the convention was brought on; delegates were elected in 1893, and a convention was held in 1894. But, lo, after everything was right and the convention was determined upon, there came a revolution in the politics of the state, and the other party elected a majority of delegates and controlled the convention.

At this time it seemed to some one—I don't know to whom—that it would be a bright stroke of politics to advance the convention, and so a special election was held, and the convention was brought on by a narrow majority, composed in part, we already know through judicial decisions, of fraudulent votes. But lo, after the convention was thus determined upon a revolution occurred and the other party controls the convention.

And the lesson is that it does not pay to be too acute and adroit and cunning in American politics. The best way is to go on in a simple, direct, honest, faithful effort to help the working of our free self-government. Whoever does that will go ahead of the very smart politicians every time.

I wish to mention another parallel, or contrast, between the two conventions which I think is cause for great satisfaction.

[1] Address as presiding officer at the dinner meeting of the Academy of Political Science, November 19, 1914.

In September 1894, the convention of that year had substantially completed its work, and had taken a recess for a few days to enable the committee on revision to give the last careful consideration to the terms or form of the work. I went up from Albany to Saratoga, where the Republican convention was held. I found myself put upon the committee on resolutions; I attended the meeting of the committee, and some one produced a platform which had been prepared and which was handed to the chairman of the committee. The platform was read, or run through hastily, and the chairman was about to put it to a vote. I noticed that no mention was made in this platform of the work of the constitutional convention—a convention the majority of which was composed of Republicans, nominated and elected by Republican votes. We thought that the convention had done some good things; but it was not considered of sufficient consequence to mention in the resolutions of the Republican convention which met immediately after the work was completed. I made some observations upon that subject, and was very loyally seconded by a gentleman for whom I have always had the kindliest feeling, the late Timothy Woodruff, and a clause was put into the platform approving the work of the convention. This year I went to Saratoga to attend the Republican convention, and there were present between twenty and thirty of the ablest leaders of opinion from all parts of the state of New York, who spent three days in discussing the question as to what position the Republican party ought to take in regard to the work of the constitutional convention. That marks a change in the public attitude towards questions of government.

And this meeting is something which twenty years ago never had a parallel. The members of that convention evolved out of their inner consciousness the provisions which seemed to them to be good for the state; and they had little help from anybody except the people who had a particular ax to grind. I don't care much whether people when they start are thinking right or wrong; I don't feel any apprehension about the people being too radical, or being too conservative. So long as the thoughtful people of the republic will take a real interest in

questions of government, will think about them and discuss them, so long we are sure to come out right.

Twenty years ago the thought and the feelings of the people of this state were asleep on fundamental questions of government. To-day the thoughts and the feelings of the people of this state are awake, and interest is keen. Consequently I feel the greatest confidence in the product—not so much in the deliberations of the convention itself, as in the force of intelligent, instructed, and mature public opinion of the state, operating upon the minds of the members of that convention.

Now let me say something practical about your work for the convention. The time is rapidly passing during which abstract discussion can be made useful. The convention will meet in the first week in April, and when that time comes it will be too late for the processes of general instruction. All the discussion that has been going on during these recent years, the discussion you are having now, must be brought into converging lines of practical suggestions—definite, certain, positive, practical suggestions, not discussions of theories of government, but helpful proposals as to what shall be written into the constitution.

The convention meets, I say, the first week in April. The time during which any suggestions can be made after the meeting begins will be very short, because we soon run into the heat of summer. There are three stages of consideration of every proposal: first, consideration in committee; next, consideration by the convention, and at the same time, the general public verdict upon the reports of committees; and then, of course, consideration by the public after the convention has done its work. But the important, vital period of consideration is consideration in committee. That has got to be done in the early part of the convention, and the committee reports have got to be made early in order that there may be adequate discussion on the floor of the convention. Any one who has ideas as to what ought to go into this new constitution, or what amendments ought to be made to the old constitution, should get to work and prepare his ideas so that they can be presented to the convention promptly in April, so as to let the

committees get to work at them. The convention will be obliged to fix an early date after which it will not receive and will not permit the introduction of new amendments. Otherwise the committees could never complete their work, and therefore the convention could never get at its work in considering committee reports. The time for you to bring to bear upon this important work the results of all your study and thought and discussion is very brief. You should lose no time in getting down to practical results.

Of course there are two quite distinct branches of work for the convention. One is the machinery of government. Our social and industrial conditions have changed vastly in twenty years. The business of government in this great state has outgrown the machinery of government. Much blame that is visited upon individuals is really due in a great measure to a defective system—a system adequate in simpler times, when the work to be done by government was quite within the experience of ordinary everyday life, and when any member of the legislature or of the executive branch could get on with it without much special study. The increase in the multiplicity and complexity of things to be done calls for a shifting of the centers of activity. When a legislative body has more business to do than it can properly consider, there is only one avenue of relief, and that is a continual increase of delegation of power. What the legislature could readily have done fifty years ago, the legislature could not half do to-day, and it must delegate the other half to someone else. That delegation of authority to subordinate officers or bodies that must exercise discretion formerly withheld from them, that must make rules and regulations upon matters formerly dealt with by statute, requires careful adjustment of governmental machinery, and we have not the machinery properly adjusted for that necessary process of government. That is in general the occasion for the practical overhauling of the machinery of our state government. And as to that, everybody who has practical knowledge about the affairs of government ought to put his mind to work to see what useful suggestions he can make; for there will be a thousand men outside of the convention with practical experience

about the operations of government and useful ideas regarding it, to one in the convention.

The other field is the field of the principles of government, a field in which our American constitutions occupy a place of their own in all the world, a place of their own in all the history of government. So far as the principles of government declared in our constitutions are right they do not change. No development of social or industrial life changes a true principle. And there are certain dangers to be considered when we turn our attention to that field of the convention's work—the reconsideration of the fundamental principles of government which are to direct, limit, control the operations of the government of the state.

In the first place, there is always the danger coming from the people who grow faint-hearted, because the path of liberty and justice is narrow and a hard one to tread. You see sometimes a young man who begins life with brilliant talents, undertakes this profession, and presently, finding it difficult, turns to another, and after a while leaves that and turns to another, and then to still another. His life is wasted. There is a little tendency of that kind in government. No great principle can be applied year after year, and generation after generation, where the people develop incompetency, and cease to grow in intelligent capacity. No principle can be applied without meeting obstacles, and being surrounded by inconveniences, and having the faint-hearted say, " Let us find some other way to work out our salvation. Oh, to abandon the hard and painful and trying effort! "

To grow in power, to grow in capacity for true liberty and true justice by holding fast to true principles, is hard. There are many who grow tired, who would find some easier way; but the easier way will but lead from the true path into some other easy way, and that into some other. Self-government, which is the basis and essence of our free republican government, is hard and discouraging. It requires courage and persistency and true patriotism to keep the grip on the handle of the plow and drive the furrow through. But wherever there is a true principle embodied in our constitution, we must stand by it and maintain it against all patent nostrums.

On the other hand, there are indications extensive and numerous of a reaction from certain extreme views, from certain enthusiasm for new devices in government. But we must remember that if reaction goes too far the pendulum will swing back the other way. All our statements of principle must be re-examined, not with faint hearts, but with a sincere purpose to ascertain whether the statement is sound and right, and whether it needs modification with reference to the new conditions in order more perfectly to express the principle.

I feel very differently about this convention from the way in which I felt twenty years ago, because it seems to me that upon this field of action dealing with the fundamental principles of our government we are performing the highest and most sacred duty that civilization ever demands from man. All the little questions of form and method may be right or wrong; we may solve them rightly or wrongly. If they are wrong they will be changed. If the law is wrong it will be changed. If it is not perfect it will be amended. But when a people undertakes to state fundamental principles of its government, it is putting to the test its right and its power to live. Millions of men in Western Europe to-day who are battling with each other, dying by the thousands, are fighting upon one side or the other of two different conceptions of national morality. Homes are desolated, children left fatherless, because two great principles of national morality have met in their death-grip. The nation which lays hold of the truth, of the true principles of liberty and justice will live. The nation that is wrong, the nation that fails to grasp the truth, will die. In our effort or attempt to make and re-make the constitutions of our beloved country we are putting to the test the very life of the country. To that task we should address ourselves with the prayer that we may be free from selfishness. That task should be performed with a sense of duty to one's country that rises to the level of religion. With the help of all the good men and women of our state we should be able to keep this convention right, upon the eternal principles by which alone our free and peaceful and just country can continue.

THE CONSTITUTION AND PUBLIC OPINION [1]

FREDERIC C. HOWE

Commissioner of Immigration at the Port of New York

POLITICAL institutions in America have been designed on the principle of distrust. *Fear* of the people, *fear* of the legislature, *fear* of the executive, has inspired constitution makers and law makers from the very beginning. *Fear* has shaped our political machinery in city, state and nation. We are indebted to Alexander Hamilton for this political philosophy, just as Germany is indebted to Bismarck for a similar imprint upon the political institutions of that country. Hamilton sought to make perpetual the eighteenth-century ideas of government of Great Britain, and up to very recent years his influence has not even been challenged.

This distrust of the people on the one hand and of officials on the other led to the creation of innumerable checks on freedom and obstacles to action. Instead of simplicity, there is confusion. In place of directness there is indirectness. For responsibility there is irresponsibility. From the beginning of the germination of a political idea on the part of the voter to its final enactment into law there is obstacle after obstacle to be overcome, each of which checks initiative and sacrifices efficiency.

Strangely enough, we have adopted a diametrically different course as to business, as to industry, as to all commercial activity. No country in the world has permitted as free incorporation laws as have we. No country has sanctioned ease of organization, directness of action and concentration of power in private affairs as has America, and in consequence American industry, trade and commerce have developed with phenomenal rapidity. The private corporation suffered under none of

[1] Address at the dinner meeting of the Academy of Political Science, November 19, 1914.

the limitations imposed upon the public corporation; it enjoyed freedom and the greatest flexibility.

Obstacles to Efficiency

Among the more important burdens which this philosophy of distrust has imposed upon our political institutions are the following:

1. Extreme rigidity in our federal and state constitutions. Amendment is made as difficult as possible; in some states it is practically impossible. The assumption of constitution makers seems to have been that eternal wisdom was possessed by the generation entrusted with the making of the constitution, and that the results of their labors should be crystallized into permanent, unchanging form.

2. A second check, born of distrust, was the indirect election of the President by the electoral college, and of the United States Senate by the state legislatures, provisions which have since been abandoned or changed.

3. Other checks are provided in the veto of one legislative branch upon the other, as well as in the power of the executive to overrule the acts of the legislative department.

4. Still further obstacles are provided in the power of the courts to review and veto legislation, as well as in the lodgment of final authority in the written constitution, whose interpretation is entrusted to the judicial branch of the government.

5. Confusion is further confounded by the different lengths of terms of officials and the different methods of selection of the different departments, the courts being appointed for life or elected for long terms, while the Executive, the Senate and the House of Representatives are chosen for different periods. Each of these branches of the government represents a different electorate; each represents a different method of selection and a different time of contact with the people. At no time can the settled conviction of the public impress itself upon the whole government, as is possible under the British parliamentary system, or as is possible in most of our cities.

Checks and Obstacles in State and City

This negative philosophy of distrust found further expression in the constitutions of the states, in their laws as well as in the municipal codes provided for the cities. Almost all of the state constitutions provide for biennial sessions of the legislature, on the assumption that state legislatures are a nuisance and should meet as rarely as possible and for a very short time. In many states the length of the legislative session is limited to forty or sixty days. In others it is limited to ninety days. Sessions of this length virtually preclude any serious legislation being enacted; for, as anyone familiar with legislative bodies knows, it is practically impossible for such a body to organize, select its officials, provide its machinery and acquaint itself with the procedure, much less pass legislation through the routine of readings, committees, hearings and action, in such a short period of time. Certainly a legislative session of from forty to sixty days is little more than a farce. By such limitations as these we have invited legislative control by outside interests, or, where these do not prevail, by the undue activity of the executive branch of the government.

Methods of nomination and election reflect the same spirit of distrust. The caucus and convention were designed to remove the nominating power from the direct control of the people. These still further confused action and paralyzed initiative. Distrust added from one to half a dozen intermediaries between the voter and his representative. The long blanket ballot was an additional burden. This idea of distrust was carried into local government. It led to the denial of home rule to the cities; it involved complete dependence of the municipality on the state, with the log-rolling, trading and ripper legislation under which almost all of ours cities have suffered. Up to very recent times, cities enjoyed far less power than private corporations; in the rarest of instances were they equipped with power to perform their routine activities in an efficient and economical way. The same distrust expressed itself in limitations on the city's financial operations. The tax rate was limited, as is the amount of indebtedness that can be incurred. In some instances the limitations on the cities are so serious that they cannot per-

form their necessary routine functions in an adequate way. None of our cities are in a position to plan their development, none of them are able to control the license of property. Few of them are able to own the public service corporations, which lie at the very center of the city's life.

Nor can the city adjust its system of taxation to local needs or desires. In this, the most important side of the city's life, it has none of the flexibility of a private corporation. In small things as in large, the city has little latitude to experiment, to plan for an adequate municipal life. All cities are cast in much the same mould.

Organization for Political Inaction

As a result of the limitation referred to in the federal and state constitutions, inaction has to win but one skirmish, while action has to win a series; reaction need control but one agency of the government, while progress has to control them all. Before public opinion becomes the final law of the land it has to struggle to the point of exhaustion to bring about the change desired, while democracy has frequently to survive many elections to achieve its end. A single reaction in popular opinion may block progress for a generation, through the loss of either the legislative or the executive or the judicial department; reaction may prevent fundamental change for a century by the action of the framers of the constitution.

We have reversed all of the principles of life in the political machinery of the nation, the states and the cities. We have organized our politics in fear of the bad man, and by so doing have left little opportunity for the capable one. There is little to awaken the ambition of the man of talent, little to lure him from private life, where freedom invites initiative and power. We have crippled the power of ambitious officials in our efforts to protect the community from the incompetent one.

Not only has this spirit of distrust paralyzed the officials; it it has palsied the public as well. The political psychology of America is what it is by reason of these conditions, which of themselves breed discouragement and inaction. In every walk of life men are moved to action by the hope of results. When

success is subject to innumerable obstacles, when the end desired is distant and highly problematical, when the fruits of effort are subject to veto by irresponsible judicial officials or interpretation placed upon the constitution, then initiative and effort are discouraged. It cannot be otherwise. And from the earliest step in the promotion of a political idea to its ultimate and final achievement, hurdles after hurdles are erected in the path, which tend to the impairment of effort and the destruction of courage. When one contemplates all of the legal limitations to organized political action in America, the wonder is not that political interest is so lax but that political interest is as keen as it is. And in view of the institutional obstacles and legal limitations referred to, it is unjust to assume, as most observers of American politics do, that our failures are traceable to the political incapacity of the American people; they are rather traceable to the machinery with which we have to work.

America Alone in Its Political Philosophy

It is true there has been but little organized protest against this political philosophy. Critics of American conditions have placed the blame on the American people. Despite this fact we have the negative criticism of other peoples which have adopted written constitutions; for while America was the first nation to adopt a constitution and the first people definitely to sanction the philosophy which underlies it, still no other nation in any section of the globe has followed the model which we offered to the world. No country has assumed that its constitution was sacrosanct; none have entrusted the courts with such absolute power over the acts of the other branches of the government. None have approved of the idea that officials should be subject to every possible obstacle in carrying out their acts. Only in America is it assumed that indirection is to be preferred to directness and that confusion is more desirable than simplicity. The constitutions of two other great nations have avowedly declared that ultimate power should be lodged in a powerful economic class, to wit, Germany and Great Britain. In Germany the imperial constitution practically reposes final authority in the feudal military caste of Prussia, while up to 1909 Great

Britain lodged the right of perpetual veto in an hereditary upper chamber, composed almost exclusively of great land owners. In both countries the constitution was practically almost unchangeable, except by revolution or the consent of the classes entrusted with power. In America indirection and confusion resulted in the ascendancy of a similar privileged economic class, which ruled almost uninterruptedly in the nation, state and city for nearly half a century.

And it should be frankly acknowledged that the avowed motive of Hamilton and his associates was to lodge power in the privileged classes. Hamilton distrusted democracy, he distrusted representative government, and he carried his convictions as far as it was possible in the federal constitution. And it was the provisions incorporated into the federal constitution and copied into the constitutions of the states that made it possible for privileged interests to acquire an ascendancy in the government and retain that ascendancy almost unchallenged for the greater part of a century. These conditions made it easily possible for the slave-owning, aristocratic South to control at least one branch of the government for a generation prior to the Civil War. It made it possible for the privileged interests of the North to control the government, in whole or in part, up to the end of the nineteenth century. For confusion, indirection and divided responsibility, with a fixed written constitution, to be interpreted only by the courts, make it difficult for democracy to achieve its will; they make it easy for the boss and privileged interests to control at least one of the branches of the government.

Proposed Axioms of Politics

Is it possible to formulate principles in the framing of a constitution, in the planning of the political machinery of a people? Is it possible to lay down axioms of politics, like those which Adam Smith enunciated for taxation? And if such axioms may be formulated, are those upon which we have been operating for a century the correct ones? Should public opinion be compelled to square itself with the opinions and phrases of generations long since dead; should the opinion of to-day be

called upon to convince in turn varying groups of elective officials and appointive ones as well? Should every presumption be against change and in favor of the *status quo*? Should the common business of all of us be conducted on the principle of inaction, and the private business of each of us be granted a liberty of action close to license? For the principle underlying American industrial life is freedom,—the greatest possible freedom to organize, to act, to play, not only with property but with the destinies of the community as well.

I believe there are axioms of politics as fundamental as those of taxation, as fundamental as those of private business. Among those axioms I should include the following:

1. Politics should be simple and easily understood by all. Issues should be free from confusion. There should be a direct line of vision between the voter and the end desired and a means for the immediate execution of the common will, once it is declared at the polls.

2. The relation of the voter to the government should be as direct as possible. There should be the fewest possible intermediaries, such as electoral colleges, delegates, conventions, and caucuses between the citizen and his servant.

3. Government should be responsive on the one hand and responsible on the other,—not to the past, not to political parties, not to interests, but to people.

4. The machinery of legislation and administration should be equally simple, direct and final in its action. Once the public will express itself, it should be registered into law.

Principles to be Considered in Framing New York Constitution

Reducing these political axioms to the subject in hand, that is, the constitution and public opinion, I should suggest:

First, the constitution should be as short as possible, following the model of the federal constitution, which is little more than an enumeration of the powers of the various branches of the government, to which was added the bill of rights. State constitutions departed from this model. They have been enlarged to indefensible lengths, and by reason of their enlargement and the inclusion of many legislative provisions, the under-

lying idea of a constitution as a framework of government has been lost sight of.

Constitution an Evolving Instrument

Second, the constitution should be an evolving instrument, not an inflexible, finished thing, complete in all its details for a generation, or as in the states of Kentucky, Indiana, Rhode Island and Connecticut, practically unchangeable for all time.

The constitution should reflect changing social conditions and changing needs. It should mirror the seasoned convictions of the nation, rather than lag many years behind them. It should have more permanence than a legislative act, and amendments should be approved by the people. But it should not be necessary for two successive legislatures to approve of a resolution permitting an amendment to be voted upon, and the majority within the legislature for submission ought not to be prohibitive. It should provide that a two-thirds majority of any general assembly or a mere majority of two successive assemblies may submit an amending resolution. Further than this, provision should be made for amendment by the direct action of the people themselves, acting through petitions submitted for this purpose. If five or eight per cent of the electors of a state like New York are sufficientiy exercised over a condition to go to the trouble and expense of preparing petitions, then their petition should be given a hearing by being placed upon the ballot, the same as a resolution regularly submitted by the legislature; and if a majority of those voting upon the proposal favor it, it should become part of the organic law of the state. This is the very essence of the right of petition, sanctioned in every constitution, for the right of petition is empty unless it can be made effective. It is also of the essence of responsive and responsible government, as well as of the idea of an evolving, changing constitution, reflecting the seasoned opinions of the community. It is unfair to a people to require it to accept for a generation's time the deliberations of a group of representatives, whose opinions can be known only after they have deliberated, without power to escape from their opinions by any action which the people themselves may take. This is not representative government; it is government by chance.

Separate Submission of Debated Questions

Third, in keeping with the above suggestions, amendments to the constitution, involving radical departures like woman suffrage, prohibition, the initiative, referendum and recall, should be submitted as separate proposals for the discriminating action of the voter. Alterations in the fundamental laws such as these should not be incorporated into the body of the constitution when submitted but should at all times and under all circumstances be open to unincumbered action by the electorate. The Ohio constitution of 1912 contained many separate and detached amendments, placed before the people in separate columns, upon which the electors passed individual judgment. About one-half of these proposals were adopted, the other half were rejected, showing a more highly developed political intelligence than the electorate is generally assumed to possess.

Commission Government for State

Fourth, in keeping with the idea of simplicity and efficiency, the commission form of government should be substituted for that which now prevails. The legislature should consist of a single chamber of a relatively small size. A legislative body composed of one representative from each congressional district would be adequate for all purposes. It should be in continued session all the year, as is the Congress of the United States. Surely, if the needs of the smallest town require the attention of its council for twelve months in the year, the legislative body of a commonwealth of 10,000,000 people, more than three times the population of the United States when the constitution was adopted, requires the same continuous legislative service.

The commonest complaint of our assemblies is that they pass too many laws and too hasty legislation. Much of this is due to the size of the legislature. Each member feels that at least one measure must bear his name. As a consequence, state laws command little respect, and for the most part are entitled to no more respect than they receive. A small legislative body

in continuous session, acting with the informality of a city commission, would result in more mature deliberation, more intelligent action and a great decrease in the number of ill-adjusted laws which issue from our state legislatures, even when they are in session for but a few months in the year.

In addition, I should suggest that the governor should appoint the members of his cabinet, including the attorney-general, the secretary of state and the executive heads of other departments. The governor and each member of the cabinet should have a seat in the legislature, with the right to discuss all measures, but not to vote. This is a provision now found in many city charters; it has resulted in greater unity of action and increased municipal efficiency.

This is perhaps as near an approach as is possible to the British idea of responsible cabinet government. It should tend to bring into politics a more highly trained type of man, as well as greater unity in the administration of public affairs. In connection with this, I would entrust the governor with the appointment and easy removal of the directors of all executive departments, whose relations to the governor should be somewhat similar to those of the department heads in a great city.

Short Ballot

Fifth, the short ballot. The commission form of government would lead to the short ballot. It would reduce the number of elective officials to the governor and the member of the state assembly. This would simplify elections and automatically make it possible to select a higher type of man than those who now go to the assembly. Further than this, it would lure better men into politics, for the opportunities of real service offered would prove attractive to the best-equipped men in the community.

In addition, I favor longer terms of office for the governor and the members of the assembly. I should suggest a term of four years, with the right of recall. By this means the official would always be responsible to his constituents, while a

continuing policy, covering a reasonable period of time, would be open to achievement by an administration.

Right of Judicial Review

Sixth, I have never believed that the federal constitution contemplated the power of judicial review of congressional or executive acts. The constitutional provisions seized on by the courts to justify their interposition are entirely inadequate to sanction such assumption. The recently adopted constitution of Ohio recognized this protest against judicial usurpation and provided that no act of the legislature should be held to be unconstitutional by the supreme court, except when such decision was concurred in by six out of seven members of the highest appellate tribunal.

Complete Municipal Autonomy

Seventh, complete home rule should be accorded municipalities. They should be permitted to prepare their own charters; to determine for themselves what activities they shall perform; what industries and activities they shall engage in; what salaries they shall pay, and what powers they shall exercise over persons and property within their midst, subject only to the constitutional safeguards. Municipalities should have the same freedom to experiment that a private corporation now enjoys; they should be permitted to decide for themselves as to the sources from which they shall collect their revenues and as to the way in which they shall spend them. The amount of their bonded indebtedness should be determined by the community itself, as well as the purposes for which such indebtedness is incurred. Cities should have the same autonomy now enjoyed by the state and the nation. Within their own sphere of action they should be sovereign, much as are the cities of Germany and some of the cities in our western states.

Such a devolution of power would relieve the legislature from the burden of considering local demands and would render it possible for the city itself to develop its own life and adjust its administration to local needs, as is not now possible when the financial limitations of a municipality are fixed and

determined by the constitution or the state laws, and are necessarily unresponsive to local necessities.

Direct Legislation

Eighth, adequate responsiveness to public opinion involves provision for direct legislative action by the people themselves, through the initiative and referendum; and of these two devices the initiative is by far the more important. The referendum is negative. It usually relates to questions in which the people have no great interest. And the failure of large numbers of people to vote upon referendum measures is no index of the response which would follow to measures initiated by the people themselves. The initiative is the final step in democracy; it involves a government which mirrors public opinion. That it is not likely to be used for radical purposes is indicated by the experience of western states, as well as of Ohio, where the presumption of the unenlightened voter is against a new measure rather than in favor of it. But most important of all is the educative influence of referendum elections on measures initiated by the people themselves. They lead to constant discussion, to a deeper interest in government, and to a psychological conviction that a government is in effect the people themselves. And this is the greatest gain of all. It has been said that the jury is the training school of democracy. To an even greater extent is this true of the initiative and referendum.

Political Freedom—a Principle

The underlying motive of the foregoing philosophy is fluidity, responsiveness, freedom; freedom of society, in its collective capacity, to develop its own political life; freedom to evolve, to grow by change, just as does the individual, just as does the whole animal and even the vegetable kingdom. And I have no more fear of mankind in its collective capacity than I have of mankind in its individual capacity. And if there is any quality which stamps American life, American character, American industry, it is freedom. Freedom explains our

achievements, it explains our industrial development. It explains the ingenuity, resourcefulness and courage of the nation. And freedom is, I believe, the law of all nature—a law as immutable in its ultimate blessings as any that nature sanctions,—not the patch-work freedom with which we are familiar, the freedom that gives privileges to some and burdens to others; not the freedom that fails to distinguish between that which is essentially public and that which is essentially private; not the freedom which grants license to the individual and chains to the community; but the freedom of each man to live his individual life, so long as he does not interfere with the equal freedom of his fellows and the right of the community to live its life and to control the individual, so that he will not exceed the freedom vouchsafed to him.

Finally, these are the principles I would apply to government affairs. Politics should be simple, rather than confused. Officials should be responsive, not irresponsible. There should be an end of checks and balances. There should be a direct vision between the citizen and his servant, and easy means for the community to achieve its will, and an equally easy means to change its decisions when it finds itself in error. In fine, I believe that government should be responsive to public opinion and free to reflect that opinion in legislation when expressed.

THE PRINCIPLE OF RESPONSIBILITY IN GOVERNMENT[1]

HENRY L. STIMSON

A DELEGATE to the constitutional convention owes it not only to his fellow delegates but to the people who sent him to the convention that he should approach with open mind those questions of practical remedies with which it is the main business of the convention to deal. His mind should be open to the arguments of his fellow delegates and to those suggestions which we hope will come from the thousands of friends and citizens outside of whom Mr. Root spoke. Particularly in regard to questions of specific remedies, in a state so varied as ours, there is nothing so helpful as discussion and the experience of different minds.

When it comes to certain questions of general principles, however, and analysis of well-known evils, there is perhaps a broader field for preliminary discussion and decision, even among those of us who may be delegates at that convention. One of the most important of those broad principles is the one which the program committee has placed after my name—the principle of responsibility in government.

I remember that the first time I went to the polls to vote I was accompanied by an older member of my family, who on the way explained to me his theory of action as a voter. He said: "I like to vote so that I shall throw my influence to elect a governor of one party and the legislature of the other. I feel that if we only elect, for instance, a Republican assembly and senate and a Democratic governor, I can go home for the rest of the winter and feel that those two will hold each other from doing any harm." It has taken a good many years experience on my part to appreciate the far-reaching nature of

[1] Address at the dinner meeting of the Academy of Political Science, November 19, 1914.

that idea and its all-pervasiveness in our country. Looking at it now, it seems to me to represent both the cause and the effect of irresponsible government. In how many departments of our law you can follow and trace the operation of this conception.

On the side of administration it was the idea underlying Jefferson's advocacy of short terms for our executives, for fear of giving them too much power. You must not give a man power to do right for fear he will do wrong. It was the basis of the proposition of a plural executive that Hamilton fought so vigorously against inserting into the federal constitution. The proposal was to divide the office up among different men so that one man would not have all the power of execution; and it required all Hamilton's persuasion—if you have read the seventieth number of the *Federalist*—calling attention to the bad example of the consuls and decemvirs of Rome to meet the insistence of the argument for a divided executive. Later on, in the thirties and forties, the idea fairly ran riot through our state constitutions. A great wave of liberalism rolled over this country, corresponding to the great wave of democracy in Europe that culminated in the revolution of 1848. Our state constitutions were changed so as to elect everybody, thus making everybody directly responsible, as it was hoped, to the people, and providing that all public officers in that way should be independent of each other, so that no one of them should grasp too many of the powers of government. Multiple elections, rotation in office—you have all heard the many different ways in which the idea expressed itself.

When you pass over from the administrative to the legislative branch of the government, you find it not only in the short terms of our legislators, but far more generally and insidiously in the provisions of recent constitutions which put limitations on legislative power, and embody in our constitutions many arrangements which ought to be merely a part of the statute law, and so within the power of the legislature to change and amend. Dennis Kearney on the sandlots of San Francisco, packing into the California constitution those limitations

which have caused that kind of constitution ever since to be known as a "sand-lot constitution," was merely echoing the same idea of irresponsible government.

When you turn to the relations of the executive and the legislature in the performance of those duties which practically all our state governments provide that they shall perform jointly, we find the same notion again. Although it is recognized that the governor and the legislature must act together in legislation it has been the aim of many constitutions that they shall perform those joint duties in as formal, as distant, and to that extent, as ineffective a way as possible. The governor must not have the right to talk to the legislature except through the formality of a written message; and the legislature must not have the right to ask questions of the governor, except through the formality of calling upon some subordinate for written information. And all this, forsooth, as I have heard it argued with vehemence by some, lest the governor dominate the legislature, and with equal vigor by others, lest the legislature "make a monkey" of the governor.

A theory of government which you can follow through such widely separated heads and through such different authors—a theory which was made philosophy by Montesquieu, and which, as has been said, was made the language of a gentleman by Blackstone, which was brought into American politics by Jefferson, which was spread very widely during the time when the vigorous followers of Andrew Jackson from the West were in command, and which was finally infused into our constitutions by Dennis Kearney—such a theory is not to be treated lightly. And when we consider its origin, there is no wonder that it has been deep-rooted and wide-spread. For ages and centuries it represented the contest against autocracy in government. So long as the law-enacting power of the state claimed his authority by divine right; so long as absolutism was the ruling force in government, every check, every limitation, every spoke that you could put into the wheel represented a distinct gain in the age-long contest for popular government. So long as there was reality and truth in the enacting clause of every British statute, "Be it enacted by

the King's Most Excellent Majesty, by and with the advice of the Lords, spiritual and temporal, and the Commons," so long it was a real necessity in that struggle to establish the sovereignty of the people.

But now that that struggle has been won, now that that power has been transferred, now that there is no longer any question of the universal recognition of the source of power; now that the executive magistrate is merely the representative of the people, is not the problem considerably changed? It is now not so much a question of putting limitations on the power of the sovereign from above, as it is of making it perfectly certain that when your agent acts wrongly you will know it. Instead of putting limitations on the public officer, the real problem now is to have his action as clear and as public as possible. There is no longer any real danger in giving your agent power, now that the people have power to replace him if they find out that he has done wrong. The danger is they may be cajoled and deceived, and may not know who is responsible. Does there not, therefore, come in by slow degrees the necessity of a new principle which, with the conservative tendency of our race to cling to old traditions, we have not yet fully recognized?

There were keen observers in the very beginning of this country who noticed this new difference in principle. In 1778, only two years after the states became independent, and when they were in the very midst of adopting their first constitutions, that great French statesman, Turgot, in a letter to Dr. Price, in London, made a searching and interesting criticism of our methods. Speaking of our state constitutions, he said:

> I see in the greatest number an unreasonable imitation of the usages of England. Instead of bringing all the authorities into one, that of the nation, they have established different bodies. A house of representatives, a council, a governor, because England has a House of Commons, Lords, and a King. They undertake to balance these different authorities as if the same equilibrium of power which has been thought necessary to balance the enormous preponderance of royalty could be of any use in republics, formed upon the equality of all citizens, and as if every article which constitutes different

bodies was not a source of divisions. By striving to escape imaginary dangers they have created real ones.

When we consider, too, the position which our state governments occupy in the federal system, we find that the principle of irresponsibility is peculiarly subject to criticism. The central government exercises such tremendous power that it is a conceivable and fair argument that unless care is taken, although you have destroyed the old king, yet another may be unwittingly created in his place by the people. But it is pretty hard to get up any excitement over one forty-eighth part of a despot; it is pretty hard to be worried over a gubernatorial tyrant. And on the other hand, from the very fact that our states are part of a federal system, their powers are necessarily so limited that if any further division of official responsibility takes place they are likely to be brought to a condition where they cannot attract the service of good men.

What is the main tonic of an independent state which keeps up the character of the personnel in its legislative body? Is it not its relations with foreign states—the right and power to make peace and war, and to conduct diplomatic relations with those states? Those are the matters which make for the dignity of our Congress, and which attract to that body the services of the best men in the country. But in the case of our states those powers do not exist. They are taken away from them. The states are guaranteed not only against foreign difficulty, but even against civil disorder. If the state authorities are unable, through their *posse comitatus,* or their national guard, to suppress even home disorders, they can call on the President for regular troops. As one writer has expressed it, they are somewhat in the condition of a rich annuitant who has sold the control of his own property in return for an assured income. In the face of these limitations which necessarily exist in our state governments, the problem would seem to be particularly urgent to provide adequate and simplified powers, which will be worthy the attention and the work of the best men in those states, and not to further separate, divide and minimize those powers.

The difficulty with irresponsible government is that it breeds more irresponsible government, and that it has always done so. There seems to be a tendency to run in a vicious circle. The more complicated we make our government the more difficult we make it to work, and the more necessary we make the services of a professional who spends his life in the work. The minute a man makes a thing his life-work he tends to make his living out of that work; and as soon as a man is getting his living out of political work, corruption inevitably comes in. As soon as that stage is reached, the people are tempted to ask for more checks and more limitations in order to put an end to such corruption. And so we go around and around and around, each new step producing more results in the same circle. In recent years the irresponsibility of our legislation and the consequent corruption of some of our state legislatures have produced a demand that even the powers left in the legislature shall be limited by the compulsory referendum and that the people themselves shall attempt to do their own law-making directly.

I have never known the case to be more tersely or clearly summed up than by Professor Ford, of Princeton, in his book on *The Rise and Growth of American Politics:*

> So long as our constitutional system provides that an administration chosen to carry out a party policy shall be debarred from initiating and directing that policy in legislation, just so long is the party machine a necessary intermediary between the people and their government, and just so long will party management constitute a trade which those who have a vocation for politics cannot neglect, and those who make a business of politics will make as profitable as possible. As Burke wisely said: "Whatever be the road to power, that is the road that will be trod."

The approaching convention has an opportunity to meet and break that vicious circle. I am glad that I was elected on a platform which declared for responsible government. It takes courage to meet the existing situation. It takes courage to face the people and try to persuade them that the sugar-coated remedy which they have been in the habit of taking will

only make the disease worse. It takes courage to follow the opposite road from the easy one of the demagogue who clamors for more direct government by the people, ignoring the fact that only through the concentration of responsibility can we insure effective democracy. I hope and believe that the delegates of the state of New York in its coming constitutional convention will have the courage and the leadership to take such a course.

THE ADAPTATION OF A CONSTITUTION TO THE NEEDS OF A PEOPLE[1]

FRANK J. GOODNOW

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THE end of the eighteenth century was marked by the formulation and almost universal acceptance by the educated classes of the European world of general political principles. These were regarded as of almost universal application at all times and under all conditions. Among them may be mentioned the sovereignty of the people, the separation or distribution of the powers of government, and the existence of natural rights which were inherent in man.

It was believed at that time that no good government could be established except on these principles. It was of course admitted that in some countries conditions were such that these principles could be applied with greater immediate advantage than was possible in the case of others. But it was on the whole considered to be true that in all countries the application of these principles should be made because of the educational effect upon the people, who would learn much even from the failures and mistakes which they might make.

Perhaps in no country of the western world was there at the end of the eighteenth century greater confidence held in the universal application of general political principles than in the United States. It is almost certain that there is no other country in which this general idea has been retained with so little modification.

The reasons for this attitude in the United States are not far to seek. The revolution which broke out in this country and the changes in the form of government made necessary by its successful conclusion forced upon the people of the United States the formulation of principles upon which the new polit-

[1] Address at the dinner meeting of the Academy of Political Science, November 19, 1914.

ical organization might be based. Further, the comparatively simple character of the social conditions which obtained in the North America of that day made the application of the principles accepted an easy matter. Little government of any sort was necessary. The free play of an almost unadulterated individualism, a corollary of the principle of natural rights, might be relied on to accomplish what was then regarded as the one supremely desirable thing, that is, the material conquest of the American continent.

In the more settled and more complex conditions existing in Europe, however, the principles which had been received with such enthusiasm on this side of the water came soon not to be regarded by the thinking world with the same favor. Apart from France, governmental changes were not so sudden as they were here, and the increasingly industrial character of European society soon seemed to cause evils which could be remedied only by a limitation of the conception of natural rights.

We find in Europe quite early in the nineteenth century that most of the principles which had been by many supposed to be of universal application were questioned. Popular sovereignty lost much of its hold upon the European mind as a result of the happenings of the French Revolution and the subsequent conservative reaction. The idea of natural rights was in large measure replaced by the conception of rights based on the law of the land as fixed by a representative legislature. The principle of the separation of powers was greatly weakened in its application to concrete political facts, or else its general applicability to government was denied.

The announcement in the world of natural science of the principle of evolutionary progress through adaptation to changes in environment, and its general acceptance by scientific men could not fail to have their influence on the speculations of political thinkers. Gradually there grew up the so-called historical schools of thought as opposed to what had been philosophical and speculative schools.

The result has been that in a little over a century a remarkable change in the mental attitude of political writers has taken place. Whether of European or of American nationality, there is

much less dogmatism on their part than was formerly the case. At the same time it cannot be denied that the old ideas with regard to universally applicable political principles are still maintained by many in this country whose intellectual training has been influenced by the political philosophy of the latter part of the eighteenth and the early part of the nineteenth century. Perhaps nowhere is the force of these ideas greater than among the judges of our courts, who have had great influence on political development in this country through their power to declare unconstitutional acts of our legislatures. In many instances it is, however, to be remembered that the decisions of our courts on constitutional questions do not necessarily reflect the personal opinions of the judges, since they must follow constitutional provisions adopted under the influence of the older ideas and as yet unaffected by the political theories of the present day.

But, for whatever reason, it is nevertheless true that in the United States probably more than elsewhere there still lingers the belief in political principles of universal application, regardless of the economic and social conditions obtaining in particular countries and of the history and peculiar traditions of those countries.

The existence of these ideas and their disastrous effects upon constructive political work have been brought most forcibly to my attention during the past year as a result of the experience which it has been my good fortune to have in connection with the attempts made in China to frame a constitution for its new republican government. Perhaps a short statement of what has happened there will be of value in throwing light on the subject which has been assigned to me this evening, *viz.*, the adaptation of a constitution to the needs of a people.

For reasons into which it is unnecessary to enter, a revolution broke out in China in 1911. This soon took the form of an attempt to expel the alien Manchu dynasty which had controlled the country for nearly three centuries. China is from the point of view of climate, of geography and of race divided into two great sections, *viz.*, the north and the south. The Manchus, who came from the north, had always, and naturally, a greater hold on the north than on the south. The revolution was im-

mediately successful in the south, and province after province threw off the yoke of the Manchu. In the north, however, the Manchus at first held their own.

The representatives of the southern provinces, which, it may be said, had been much more subjected than was the case in the north to western influences, assembled at Nanking, the first capital of the last Chinese dynasty, the Mings, for the purpose of providing a form of government to take the place of that which had been overthrown. The revolution had been successfully carried through mainly by what are spoken of in China as the returned students, that is, Chinese young men educated abroad. Many of these students had been educated in the republics of the United States and France, though probably the great majority had never been further from China than Japan. The fact that Japan does not have a republican form of government did not, however, have the effect of causing the Japanese returned student to look upon a republic with suspicion. Japan had been for a long time an asylum for political refugees from China, and the Chinese students in Japan were subjected to radical rather than conservative influences exerted outside of the university. Inside the university the influences were theoretical rather than practical by reason of the fact that students studied and learned from books and did not do much practical work in the nature of observation and experiment. When we add to these conditions the fact that with the overthrow of the Manchus there was no serious pretender to the throne, we find that the formation of a republic, that is, a form of government in which the executive is chosen by a more or less representative body for a fixed term, was almost inevitable. There was therefore formed at Nanking the first Chinese republic with Dr. Sun as President. This government had, however, jurisdiction over only the southern provinces.

A union with the north was desirable in order to prevent the partition of the country by foreign powers and to secure by recognition from those powers the perpetuation of what had been accomplished. This union was secured. It had three important results: first, the Manchus formerly abdicated; second, the form of government remained republican; third, Yuan-

Shih-Kai was elected Provisional President in place of Dr. Sun, who resigned.

This arrangement was a compromise, and like most compromises it left many important things unsettled. It was not only a compromise, but it was as well frankly recognized as provisional and temporary.

The most important feature of the compromise thus made was to be found in the fact that by the election of Yuan Shih Kai as Provisional President a conservative counterpoise was opposed to the radicalism of Young China. For Yuan Shih Kai was one of the ablest of the men who had been associated with the last days of the Manchu dynasty. I have spoken of him as conservative. He was really conservative only comparatively speaking. He had always been regarded before the revolution as one of the most progressive of the higher Chinese officials. During the time that he was viceroy at Tientsin he had encouraged education along western lines. He had been more than any other one man responsible for the building up of a modern army. But the pace of reform had become faster than he liked and he was on that account regarded by Young China as conservative if not reactionary. But, whether Yuan Shih Kai be regarded as progressive or not, his entrance into the new republican government marked the accession to the ranks of those in control of the new movement of an element other than the radical and theoretical western-educated Young China.

It is believed, however, that this more conservative and practical element had little influence on the provisional constitution which was then adopted. This constitution was apparently framed with little regard to Chinese conditions. It was based on the theory that a constitution itself would exercise a controlling influence on political action regardless of the conditions and traditions of the people to which it applied. It was thus so framed as to lay greater emphasis on the legislature, to which the Chinese people were quite unaccustomed, than on the executive, with which they were all familiar. This is seen from the provisions requiring legislative approval of the most important appointments and making it necessary that the President's cabinet should have the confidence of the legislature. When the

provisional constitution first went into effect the only legislative body provided was a single-chambered council. The constitution provided for the organization of a legislature by act of this council. The council acting under this provision organized a two-chambered legislature which was to inherit all the powers possessed by the council.

The necessity which the President was under of obtaining the consent of both of the two houses of the new two-chambered legislature for his important appointments was one of the causes of the failure of the provisional constitution. Another was the attempt to introduce cabinet as opposed to presidential government. But the main reason why this first attempt at a constitutional republic failed is to be found in the bitter party strife which immediately broke out between Young China and Old China. This strife was accentuated because of the fact that Young China was for the most part from the south while Old China was from the north. It finally developed into an open rebellion on the part of a number of southern provinces in the summer of 1913. The rebellion was put down comparatively easily by the President, who had control of the army, and who had by the negotiation of the quintuple loan in April of that year secured larger financial resources than were possessed by the southern Young China party.

Soon after the rebellion was put down the legislature proceeded, as provided in the provisional constitution, to draw up a permanent constitution. Young China still resolutely shut its eyes to the actual facts of Chinese life and persisted in the mistake made at Nanking, namely, of exalting the legislature over the executive. Believing the form of cabinet government as seen in the political systems of Great Britain and France to be the most highly developed kind of constitutional government, and distrusting if not disliking the President, they felt that China should have a cabinet government, under which the President would occupy a comparatively unimportant position. Before their actual experience with this form of government under the provisional constitution those in the immediate entourage of the President also were inclined to favor cabinet government. But after the experiences of the spring and summer of 1913 they

had somewhat modified their opinion. I personally had advised against cabinet government from the time I arrived in Peking, but my advice received little attention, barely a hearing. In the fall of 1913, however, I found more attentive listeners.

I do not mean to attribute this change in opinion to any influence I may have exerted. The President, who had been told that cabinet government was a good thing, did not at first know what it meant. He had, however, in the meantime found out, and he had discovered that it meant that the control of affairs was under it centered in the Parliament, which was a hotbed of partisan strife, and that the President counted for little.

It was considered necessary to obtain from the foreign powers recognition of the republic, which before October 1913 had been accorded by only one of the great powers, *viz.*, the United States. Consequently that portion of the constitution which provided for the election of the Permanent President and Vice-President was reported by the committee to the Parliament, which immediately adopted it and at once elected the Provisional President and Vice-President, Yuan Shih Kai and Li Yuan Hung as Permanent President and Vice-President respectively, —that is, for a term of five years.

Soon after this election it was discovered that the Kuomingtang, the national party which had been opposing the party in the Parliament supporting the President, had in correspondence and otherwise been, during the preceding summer, engaging in treasonable conspiracy in support of the rebellion just put down. The President accordingly declared the Kuomingtang to be a treasonable conspiracy and deprived all representatives of that organization in Parliament of their certificates of election. Without these they could not participate in the work of the Parliament. The certificates of election were taken away from so many members that those remaining did not under the law, as it was interpreted, constitute a quorum. The Parliament did not formally meet again and finally dissolved.

The Parliament which thus dissolved was, as has been said, a bicameral body. It was modeled very largely on the Congress of the United States. There was first a Senate elected by the assemblies of the various provinces. There was in the second

place a House of Representatives, the members of which were elected in the districts by electors chosen by the voters. No one could vote for such an elector who did not have the required educational qualification or did not possess a certain amount of property. But the voters under the limited franchise provided were so many in number, there was so little knowledge among the Chinese with regard to elections and election processes, and so little power of political coöperation, that in most instances the elections were rather farcical proceedings and absolutely under the control of a few active politicians. The Parliament which resulted from these elections may not be said to have been representative of any of the important interests in the country with perhaps the exception of the returned students. Its most important piece of legislation was a law fixing the salaries of the members, which were put at a rather high figure. When it dissolved most people in China who had an intelligent interest in the future of the country breathed a sigh of relief, and no serious or effective protest came from any quarter against the rather arbitrary action of the President in dissolving the Kuomingtang with the consequent disappearance of the Parliament. The Parliament representing nothing of importance during its life, no one mourned its death.

To this distinctly non-representative parliament was given by the original provisional constitution the central position in the government. Such an arrangement was foreign to the habits of the Chinese, who for centuries had been accustomed to the concentration of the power in the Emperor—the Son of Heaven —power to be exercised, however, in accordance with the dictates of immemorial custom. Furthermore, the Chinese had no legislative traditions, and had had no practical experience in conducting the work of deliberative bodies. The natural result was that the work of Parliament was not effective. Finally, the concentration of most important functions of government in its hands imposed such a burden upon it that with its ineffectiveness it could not do the work.

We have therefore a non-representative body, from the Chinese point of view strange and unfamiliar, and at the same time an ineffective body, entrusted with the most important public

functions at probably the most critical time in the recent history of the country. Naturally, little if any progress was made by it in solving the many pressing and important problems which were presented.

Just prior to the dissolution of the Kuomingtang party, the committee of the Parliament had drafted a complete constitution which was to be submitted to the Parliament for action. This draft constitution provided, as has been said, for the cabinet form of government and emphasized the legislature rather than the executive, as had been the case with the provisional constitution. The disappearance of Parliament made it impossible for this constitution to be acted upon.

Soon after the disappearance of Parliament the President summoned an administrative council composed for the most part of representatives of the more conservative elements of Chinese society. This body passed such legislation as seemed to be required, and among other things provided for a convention which was authorized to make amendments to the provisional constitution.

After sitting for some months this convention adopted amendments to the provisional constitution which greatly strengthened the power of the President. Among other things it provided for a council of state to be composed of members appointed by the President. This body was to advise the President and was to act as a legislature until the organization of a new legislature to be elected by the people. The amended provisional constitution provided that the convention which amended it should organize such a legislature and that the council of state should draft a new permanent constitution to take the place of the provisional constitution as amended.

Up to the present time all legislation has been passed by the council of state. In addition to legislation proper, that is, laws passed by the council of state acting temporarily as a legislature, ordinances of the President, who has a wide power of ordinance by the provisions of the present constitution in force, regulate a number of very important matters such as the civil and military organization of the government.

The experience of the few months of cabinet government was

borne in mind by those called upon to amend the provisional constitution, and will undoubtedly have a great influence upon the permanent constitution which will be adopted in the course of the next two or three years. It has already caused a very great increase in the powers of the President, who in the minds of the people takes the place—so far as an elected officer serving for a limited time could take that place—of the former Son of Heaven. He it is in whom are now centered all powers of government. The function of the legislature by this amended constitution is to be advisory rather than controlling, consultative rather than initiating.

Such a reversal of policy is of course somewhat disconcerting to the ardent republican who regards a republic as a government of the people, by the people and for the people. But it cannot be denied that the form of government provided by the amended provisional constitution is more in accord with the history and conditions of the country than was the original provisional constitution. For China has never really known any sort of government but personal government in accordance with immemorial custom. The Chinese people for reasons into which we cannot now enter are at present incapable of any large measure of social coöperation. Well-organized economic classes conscious of common interests do not exist in the same degree as they were to be found in Europe when representative government began to be established.

The consequence is that the organization of a representative body which will really represent anything is extremely difficult, while the development of autocracy is very easy. Under these conditions all in the nature of political reform which can be accomplished at present is to place by the side of a powerful executive a body which shall more or less adequately represent the classes of the people conscious of common interests. These classes are the *literati* class and the merchant class. The *literati* not only are conscious of common interests; they also still have an immense influence on public opinion. The merchants are already organized in trade guilds and have in the past exercised rather informally a great influence over the actions of the officials. To these two classes might perhaps be added the larger tax-payers.

To a body representing these classes and chosen from them so far as possible by some form of election, should for the present be given consultative rather than deliberative powers. If it prove effective its powers may be increased and its representative character widened, but it is extremely doubtful whether real progress in the direction of constitutional government in China will be made by a too violent departure from past traditions, by the attempt, in order to apply a general political theory, to establish a form of government, which, while suited to other countries, does not take into account the peculiar history of China and the social and economic conditions of the country.

A policy such as I have outlined is, I believe, the policy which the President is now trying to adopt. Yuan Shih Kai is, however, in addition to being a statesman, a politician. If he were not he would not be where he is. As a politician he has to accommodate himself to temporary political conditions as best he may. What those are the outsider does not and cannot know. No one therefore who is not acquainted with the ins and outs of Chinese political life can sit in judgment upon the particular acts of the President in the great struggle which he has been conducting with such consummate skill during the past two or three years. But we are in a position to express an opinion as to the general result. If we look back upon these years we see that Yuan Shih Kai has been able to prevent the disintegration of China, that he had almost succeeded in reorganizing its finances when the present lamentable European war broke out, and that he is bringing order out of disorder. At no time in the history of China has there been so little disorder attendant upon so important and radical a change of government. The overthrow of a dynasty in China in the past has usually been accompanied by wars which have devastated whole provinces, wiped out cities, destroyed great amounts of property and slain millions of human beings. At this particular period in the history of China comparatively few lives have been sacrificed and conditions are becoming better almost every day. That Yuan Shih Kai has therefore already done much for his country cannot be gainsaid. That he is endeavoring to lead China into the paths of constitutional government as fast as her

faltering steps will permit is my sincere conviction. Whether he will succeed no one of course can say. But his success in what he has attempted to accomplish in the past is certainly a happy augury for the future. One reason for this success is to be found in the fact that as a practical statesman he is convinced that the constitution of China must be adapted to the needs and conditions of the country.

THE PROBLEMS OF THE CONSTITUTIONAL CONVENTION[1]

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IT has been decided by the people of the state of New York that the time has arrived for a scrutiny of the state's organic law, with a view to such changes as may be found desirable to meet present-day needs. It is contemplated that a constitutional convention shall be elected every twenty years in this state, and that this body shall meet for some weeks or months of study and work. The result of its labors will be submitted to the people for their acceptance or rejection.

Meanwhile, there may be submitted by the legislature at any time, for acceptance or rejection at any general election, such propositions for constitutional change as may be thought desirable. In this manner, taking all the state constitutions under survey, the process of change is going on unceasingly throughout the country. Since the present constitution of 1894 was accepted by the people of New York, many amendments have been submitted, some of which have been adopted by popular vote and others rejected.

Recent New State Constitutions

Since 1894 the four new states of Utah, Oklahoma, New Mexico, and Arizona have been admitted to the Union with constitutions accepted by the President and Congress. A number of the forty-eight commonwealths have made and adopted constitutions during the past twenty years. Hundreds of amendments, furthermore, have been proposed and adopted, some of them bringing about important changes in the principles and methods of state government, while others go far

[1] Introductory address as presiding officer at the meeting of the Academy of Political Science, November 19, 1914.

toward recasting the social and institutional life of particular states.

Taking the process as a whole, it is to be praised for its freedom and elasticity, on the one hand, and for its conservatism upon the other. Thus, at the state elections held in the present month, seven commonwealths voted on the proposition to extend full suffrage to women, two of which adopted the proposal as submitted by the legislature, while five rejected it. Six states voted on the proposition to prohibit the manufacture and sale of intoxicating liquors, with the result that four adopted the proposal and two rejected it. Such changes in the organic law, expressed in a very few words, mean profound alterations in the customs and institutions of extensive regions of our country.

Simplify but Safeguard Constitutional Changes

It is generally agreed among Americans that questions at once so fundamental and so simple should be decided by the citizen body acting directly. It is also the common view that the process should be deliberate, so that no proposal of change should come before the people until it has been carefully thought out, has gained the support of an ascertained and fairly important element of the citizenship, and can be presented to the voters under circumstances which make it possible for them to give it their attention.

Two or three things, therefore, are to be borne in mind. First, that special and striking innovations are likely to come up for separate action, from time to time, and not to await the study of a convention that is called together not oftener than once in twenty years. Second, the convention will presumably be cautious in the matter of recommending a series of revolutionary changes in the governing methods and social life of the state; while, third, it will properly give much attention to the harmonious and effective working of the mechanisms of law and government. In short, it will endeavor to make the constitution fit the needs and conditions of life as it is, rather than to build a wholly new constitution, intended to

usher us into a new period of life, as hopeful and ardent reformers conceive that our modern life ought to be.

We Should Separate State from National Elections

Thus, as respects this very topic of the amending of the constitution, the convention should study carefully in order to find the best means by which to enable the people from time to time to reach intelligent conclusions under suitable conditions. Constitutional amendments ought not to be voted upon without being fully understood. They ought not to be voted upon in the moment when, for example, an exciting presidential election absorbs the minds of the citizens, stimulates party feeling, and subordinates the state and its affairs to the nation and its affairs.

The " federative balance," though delicate, is practical and of inestimable value. It means that in the very nature of the case the citizen is a nationalist as respects all that the nation can best regulate and control, while he is a state's rights' man in regard to all that can be best carried on by the particular states. Thus, in so far as possible the citizen should not be compelled to deal with national, state, and municipal questions and elections on the same day and in the same moment when he enters the voting booth.

This principle has already been recognized by the constitution-makers of the state of New York in relation to certain municipal elections. But when, two years ago this month, there occurred an exciting presidential election, the voters of New York were obliged on the same day to cast their ballots for presidential electors, members of Congress, a governor and full state ticket, together with the members of the legislature —besides which several constitutional amendments were submitted! It was impossible under those circumstances to give such attention to the governmental affairs of this great commonwealth as the conditions required.

The New York City Election as an Example

By way of contrast, thanks to a previous change in the state

constitution, there was held in 1913 a great municipal election in the metropolis of New York, involving the welfare of five million people, under circumstances which made it possible to give full and concentrated attention to the affairs of the municipal corporation. A citizens' ticket, having only slight relationship to political parties, was agreed upon and duly elected. This separation of municipal elections in cities of the first and second class, with a view to more efficient city government, had been brought before the leaders of public opinion and then submitted to the voters, with results that have been highly gratifying.

The affairs of the state, including the election of a governor, state ticket, and legislature—and, even more importantly, the election of all the members of the constitutional convention—came up for action at the polls on the third day of the present month. But it happened that on that same day the voters of the United States were engaged in the serious business of determining the party complexion of the law-making body at the seat of national government. They were electing an entire House of Representatives, and by popular vote they were filling one-third of the seats of the United States Senate. The President and the Administration had declared that the election involved the question of a vote of confidence in the national government, at a time when the most vital questions of domestic and foreign policy were under consideration.

It would seem as if the people of New York at such a time ought to have voted for United States Senator and members of Congress, and not to have dealt with state questions. The political issues involved in voting for United States Senator and state governor are widely different. Now that the legislature is relieved of the duty of choosing the United States Senator, it becomes free to devote its undivided attention to state affairs. I hold, therefore, that the constitutional convention ought seriously to consider whether the state elections, like the municipal, should not henceforth be held in the "odd" years. We shall always be electing Presidents, Senators, and Congressmen in the " even " years.

The time has come for demanding that our state govern-

ments cease to be made the footballs of national party politics. We had a long fight to convince Americans that municipal corporations could be and ought to be managed upon the strength of direct public interest in municipal life and progress, and not subjected to the ups and downs of party politics. The time has come for realizing that the functions of the states are so important that we cannot afford to have state government subordinated, in times of political excitement, to party strife and struggle relating essentially to national men and measures.

Lengthen Terms of State Officers

Thus I hold that there are certain things, involving the dignity, power, and efficiency of state government, that have to do with what may be called mere mechanism; and these things can best be worked out by the convention. There are other things, having to do with positive changes in social life and customs of the community, that can quite as well be brought forward independently, from time to time, for popular action.

In view of the need of dignifying and strengthening the state government, might it not be well to consider the holding of elections in odd years, the extension of the governor's term from two years to four (as has been done in the case of the mayor and general officers of the city of New York), and the election of assemblymen for two years instead of one and of state senators for four years instead of two, as is now the practice in almost every one of the forty-eight commonwealths.

Methods of Amendment

Since the frequent submission of amendments is, in the last analysis, a government of referendum, might there not be also some guarded plan of popular initiative? The people now have an automatic chance to elect a constitutional convention and consider amendments once in twenty years. Or the legislature may submit the question of calling a convention at any time, and it may itself submit constitutional provisions as numerously and frequently as it chooses. To these three ar-

rangements, some plan for initiative might be added, although it does not seem vitally necessary.

The important thing is to give the people a chance to take their state government seriously, to render it highly efficient, and to make it a positive agency for the accomplishment of desired ends. This being the common sentiment, one finds to-day widespread favor for the proposal to put more authority in the hands of the governor, and to hold him responsible for the administration of the various departments of the executive government. If we should elect the governor for four years, with a lieutenant governor and possibly a finance officer, allowing the governor to appoint all other heads of departments, we should have a much better system than the existing one.

The Plan of a So-called "Short Ballot" is Ripe for Action

Although I have never been able to believe that the "recall" is a very necessary thing in our state governments, I can see no reason why, with the concentration of power in the governor, and the extension of his term to four years, there might not be some provision for a recall vote at the end of two years. It is evident from recent experience that the provisions of the constitution having to do with impeachment must be revised and rendered safe. As interpreted in the case of Mr. Sulzer, the New York provisions were unlike those of the federal constitution and those of nearly every other state in the Union. I have elsewhere made it clear that in my opinion the existing provisions were misinterpreted. But I admit that there is some ambiguity; and it is imperative that the governor should be protected from the danger of being set aside at any moment by vote of a hostile assembly.

All these matters to which I have referred are associated closely with one another. They have to do with putting more strength and efficiency into the government of the state, while leaving the people free to deal with amendments to the fundamental law and with the choice of public officers—with some increase, rather than any impairment, of what may be called direct democratic action.

How to Strengthen the Legislature

While strengthening the executive for purposes of efficiency, there should be no thought that the affairs of a great political entity like the state of New York can be conducted with safety or advantage unless the most serious efforts also are made to provide arrangements conducive to high character and ability in the two branches of the legislature. The legislature of New York should be as free as any legislative body in the world from the imputation of control or undue influence by outside agencies, whether political or commercial. I make no charges against the legislature as it is; doubtless it contains many able and conscientious men. It has enacted much legislation in recent years of great usefulness and value.

But there is an impression that the sum total of the intelligence, ability, and public spirit of the state of New York does not reach its climax in the legislative body. This must be in large part because of conditions that could be remedied. It is necessary to consider whether or not the separate, individual districts in which we elect assemblymen and state senators form the best system that is now feasible. There is much to be said in their favor; but in the choice of practically half the legislature from the great metropolis of New York it is plain that this system of small districts does not give us a kind of representation at Albany that is suited to the actual conditions.

There are hundreds of measures coming up at Albany that affect the city of New York as a whole. There is no measure that affects the particular assembly district, whether on the lower East Side or in one of the outlying boroughs. A group system, where members of the legislature come from a large city, would probably give better representation.

The time will come, I am confident, when we shall elect members of the legislature from our great cities upon the plan of large districts from which a group of members are to be elected, with some system of cumulative voting or minority representation. I do not suppose that the state of New York is quite ready for such a change. But a plan ought to be found under which men of experience, who have earned some

leisure as they have reached or passed middle life, would regard it as both a duty and an honor to serve the state in either branch of the legislature. That we shall arrive at this desirable result in due time I have no doubt. Extending the terms of senators to four years, and of assemblymen to two years, and holding the elections in "odd" years—thus encouraging individual merit rather than the mere game of party politics—ought to help in some degree toward better results.

Evils of Local and Special Legislation

The people of New York have never understood how great are the advantages, on the side of good government, in those states which explicitly forbid, in their constitutions, all forms of local and special legislation. While a legislature like ours has hundreds or thousands of bills presented to it, the legislatures of certain other states—being prohibited from dealing with any measures except those of general, state-wide application—are able to give their attention during the entire session to a very few measures dealing with general topics, in addition to financial affairs. The state of New York is very complex in its form of social and industrial development, and it would be difficult wholly to abolish special and local legislation. Yet it is my firm belief that this could be accomplished almost—if not quite—completely, with inestimable advantages. At least, to the existing categories of prohibition, there should be others added by the new convention.

It will be found, for example, that a vast number of the measures occupying the legislature deal with the local affairs of New York city. If in one general act, carefully drawn, the cities of New York were given a due measure of home rule, it would be entirely feasible for New York city to create for itself a municipal government by virtue of which it could deal much more directly and efficiently with the matters which now go to Albany and are rushed through committees in the form of special bills affecting one feature or another of the city charter or the local welfare.

It is plain that the elimination of this enormous mass of local

business from the legislature would not only secure better work in the treatment of the remaining general bills, but very rapidly bring a higher order of ability and fitness into the membership of assembly and senate. Surely the convention of 1915 can at least provide for some improvement in this direction.

County Government Needs Reform

While the evils of local and special legislation would be vastly diminished at a single stroke by turning over to the large cities the details of their own government, there are still other institutions of minor administration that should be studied by the convention. For instance, the government of smaller cities and villages should be examined with a view to the adoption of clear, simple, and uniform provisions under appropriate classification and grouping. This should retain, and expressly grant, local option as between alternative forms, so that the commission plan, for example, could be adopted by a small city or a large village if it so desired.

Furthermore, it is important that the convention should recognize the need of modernizing the government and administration of counties. The least efficient and the least modern part of our administrative system, in the opinion of many authorities, is to be found in the puzzling way in which the business of the typical county is carried on in the United States. In England, they have swept away the surviving forms and traditions, and under the County Councils Act have adopted their existing businesslike organization. In the smaller divisions, corresponding to our townships, they have now the elective parish councils that show at least a capacity for finding a form of local government that is intended to meet the practical situation. We ought, in the state of New York, to devise county and town governments that would not only serve our own purposes, but would assist other states in substituting efficient machinery for the bewildering tangle and chaos of existing offices and jurisdictions.

Financial Efficiency

Not to go into statistics, I may merely call attention to the rapid increase in the financial assumptions of the state government. Since the constitutional convention of 1894, we have created a large state debt, and our current expenditures have increased several times as fast as our population. It is not to be asserted that this increase represents misgovernment or undue extravagance. It might, indeed, have been somewhat less, with even better results. But in any case it has been ordained by the people that the state shall render a number of public services that are expensive because there is an intelligent demand for a good kind of public work.

We have reached a point, therefore, where every thoughtful man knows that we ought to adopt the best kind of fiscal system that the science of administration has been able to devise in other places. This topic furnishes an example of the kind of work that can be done by a constitutional convention much better than by the plan of submitting amendments to the people on some future occasion. I do not advocate anything here as respects budget-making, or the fundamental principles of financial administration and control. It is enough to say that this subject gathers a new and pressing importance from the actual development that has taken place in the functions of the state and in the magnitude of its income and outgo, and that the convention may well consider it.

The Program of Progress and Prosperity

There are certain subjects of a very fundamental sort always demanding the attention of American statesmen. Those subjects have to do with what we may call the general welfare. The cataclysm of the French Revolution, and the more orderly revolutions by means of which our own political life has passed from medieval to modern conditions, have been chiefly concerned with the problem of extending political, economic, and social benefits to the whole mass of the people. The state of New York has undertaken certain admirable things, such as universal suffrage (which may and probably will in due time

be extended to women); universal education, with the plan of training all the children for citizenship and useful part in economic and social life; human conservation, embracing the ever-extending program of care for the dependent and delinquent classes; and material conservation, by which I mean the necessary regard for agriculture, the streams and waters of the state, the forests, and the other things that are of vital and permanent consequence in the life of any great community. I hold that these topics must be in the minds of the men who make up the constitutional convention; that there must be some general conception of the meaning and aim of the state; and of the underlying nature of a program of progress and prosperity.

As regards citizenship, it should be safeguarded and in every way hightened in dignity and value. It will be a comparatively simple matter for the people themselves to say whether or not they think the time has come for the extension of the franchise to women. But a wise body like the constitutional convention may do much to see that such conditions exist as will make it possible to exercise the rights and duties of citizenship in an intelligent and efficient way.

Give Equal Education to Country Children

The state having assumed so much authority in taking over from parents the educational development of children, there should be a careful scrutiny of the methods and efficiency of the system under which the state is exercising this great function—the greatest, indeed, of all its functions in the long run. In so far as possible, educational advantages under a state system ought to be equal throughout the commonwealth. But they have become highly unequal in New York, through circumstances which reflect no blame upon anybody, and yet which require careful and thorough-going remedies.

I could spend an hour in stating the case in full, but a single sentence may help to show my meaning. Half of the children of New York are in one school district, and are all equal beneficiaries of a magnificent school system for which more than

half of the wealth of the state is taxed. The other half of the children of the state are in hundreds, or perhaps thousands, of school districts, dependent largely upon the varying conditions of local taxation for their school facilities. Four times as much is spent for the education of a child in the tenement districts of New York city as for that of a child in the farm districts.

The state itself must equalize conditions which the growth and progress of municipal corporations have rendered unequal. The opportunities of city children must not be reduced, but those of country children must be greatly increased. This subject is so fundamental that it requires treatment in the organic law. There are other things having to do with agriculture, forestry, and the permanent prosperity of the great state of New York that claim careful attention. The city population has vastly outgrown that of the country, and yet in the long run the city will suffer if the rural life is allowed to decay. Good roads will help turn the tide, but there must be a vast development of schools and social institutions if New York's agriculture is to become—as it easily can be made to become—ten times as intensive and as prosperous as it is at present.

A Scientific Revision

The work of our constitutional convention should be scientific and thoughtful. This will be the easier because there has been no great clamor, no popular passion involved in its election. The members were elected, indeed, upon party tickets, but they were as a rule selected because of supposed fitness, and they will have little if any partisan motive in the work that lies before them. It is true that the advocates of one reform and of another will urge their views upon the convention. But there would seem to be no movement for any particular reform that is likely to be pressed with such eagerness or intensity as to disturb the deliberative mind of the convention in dealing in a well-proportioned way with its task as a whole.

It is an awkward thing for an aspiring and growing family to live in a cramped and ill-arranged house. Yet experience

has shown that it is possible to live quite decently for a time in a hut or a log cabin; and we know that it makes more difference *how the house is lived in* than what its architecture may be. We know that the political capacity and social character of the people are more essential than the forms of their political institutions. Yet these forms are important, and in due time, if they are not made suitable, they become seriously detrimental.

Previous Conventions

The first constitutional convention of New York met in July, 1776, at White Plains, just after the Declaration of Independence at Philadelphia. Its work was completed at Kingston, in April of the following year. This constitution of 1777 was accepted by the legislature and went into effect without popular ratification. There have been several revisions of the instrument as a whole, and many changes and amendments. But in its outward forms the main structure of the government of New York has not been much altered for a hundred and thirty-seven years. The convention of 1801, presided over by Aaron Burr, merely rearranged the number of members of the two branches of the legislature and provided for apportionment. The constitution of 1821 gave the more modern form and expression to the fundamental law, without changing its real character in most essentials. It was ratified in February 1822, with about 75,000 votes favoring, and 41,000 opposing.

After twenty-four years came the next general revision of the constitution, in 1846. Ratification followed in November, with 221,500 votes in favor, and 92,400 votes against the new instrument. The next convention met in 1867, after the Civil War; and its work was submitted in such a way as to be voted upon in large sections, or parts. It was all rejected except section 6, which, however, was an elaborate one dealing with the entire organization of the state judiciary. This impels the remark that the best legal minds of the state are likely to bring before the convention of 1915 certain important proposals having to do with making the courts more efficient and speedy in dealing with the vast number of cases that our great population and complex interests are now bringing before them.

The next convention was held in 1873, and this offered numerous amendments that were ratified in the following year, while keeping the main form of the constitution of 1846. You are comparatively familiar with the work of the convention of 1894 and the amendments that have been made from time to time since then by the submission of particular subjects.

New Spirit of State Government

The preamble of the constitution of 1821 acknowledged "with gratitude the grace and beneficence of God in permitting us to make choice of our form of government." The preamble of the constitution of 1846 was as follows: "We the people of the state of New York, grateful to Almighty God for our freedom, in order to secure its blessings do establish this constitution."

Note that we were grateful for being "permitted to choose the form of our government." In that phrase is summed up much of the history of Anglo-Saxon constitutional progress from the time of King John. In 1846 we were appreciative of "freedom and its blessings." We asked from the state the maintenance of order and justice, but beyond that, for the most part, we were sufficient unto ourselves, individualists, desiring to pursue our own ends without molestation.

The profound change that has taken place is not in the form of government, but in the constitution of society itself. We have immense growths of population, and radical re-groupings. We have ten millions of people, more than four-fifths of whom are living under urban conditions. A thousand applications of science and invention give us twentieth-century civilization with its new demands. The functions of government, rather than the forms, have become the important thing in the thoughts of most people. Freedom remains desirable, but the individual is no longer self-sufficing.

The state becomes more and more an agency for the working out of the purposes of corporate society. We lay tasks upon it to be performed for the common benefit. We demand that these things be done with efficiency. It is marvelous

that we should have been able to pass through such vast transitions, from the pioneer stage to our existing complex social life, with so little of constitutional change. The most important concrete thing that has come about is to be found in the life and the vitality of our municipal corporations. The state must to some extent reorganize itself in view of all this astounding development. It is no longer passive or negative in its functions.

Society proposes to use the organism of the state for purposes requiring not only the highest intelligence but a constant regard for social and ethical problems. This is especially true concerning the largest and the most complex of all our forty-eight commonwealths. I feel confident that the constitutional body of 1915 will endeavor, in so far as may seem feasible, to bring the organic law of the state into conformity with the needs and opportunities of our great period in the world's life. All that scientific groups, like this Academy of Political Science, can do to discuss the several subjects and problems that the convention should consider, will doubtless help to instruct public opinion at large; and it may be of some service to the members of the convention itself. It is in this spirit of scientific inquiry, rather than in the spirit of agitation, that the Academy in its sessions to-day and to-morrow will discuss a number of the more important of these constitutional topics.

THE CONSTITUTIONAL CONVENTION: PRELIMINARY WORK, PROCEDURE AND SUBMISSION OF CONCLUSIONS

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THIS paper proceeds upon the assumption that a convention is to be assembled under constitutional provisions substantially similar to those now in force in New York, and deals primarily with problems which present themselves in connection with the work of the convention. The most essential characteristic of the convention clause of the constitution of New York is that which makes the assembling of a convention independent of further legislative action, after the people have declared by popular vote that they desire a convention.

Preliminary Work for a Constitutional Convention

Much of the work of constitutional conventions is ineffective because the members of such bodies have ordinarly not had presented to them in usable form necessary information regarding the problems with which they must deal. Committees are, of course, appointed by conventions, and these committees must do a great deal of independent work, but a convention is a temporary body which cannot remain in session long enough to accumulate all the materials and information needed in connection with its work. Convention committees are in a much less satisfactory position than committees of the legislature, for legislative bodies meet frequently, and many of their committees accumulate in time an important body of information. For a convention, which is to remain in session but a short time, the work of accumulating information and documents must, if it is to be done at all, be done mainly in advance of the meeting of the convention.

Persons interested in particular questions will, of course, be

willing to present to a convention information upon such questions, but the accuracy and impartiality of information so furnished cannot always be relied upon. Texts of the state constitutions have in some cases been made available for conventions, but preparatory work of this sort is not sufficient. Members of a convention have neither the time nor the opportunity to investigate carefully in each case the working of provisions in other constitutions, and if they have nothing but the texts of other constitutions before them, much of their work must necessarily be done with "paste-pot and scissors."

Collections of constitutions were made available for the New York conventions of 1867 and 1894, and for the Michigan convention of 1907-08, and a digest of state constitutions was prepared for the Ohio convention of 1912. For the New Hampshire convention of 1902, a manual containing much useful information was prepared.

It is in New York that the most systematic effort has been made to prepare in advance materials for the use of a convention. Nothing was done in advance for the convention of 1846, but a compilation of constitutions already in print was purchased by the convention and a manual was prepared after the convention had assembled.[1] For the convention of 1867 it was by law made the duty of the secretary of state, attorney-general, and comptroller to cause to be prepared and ready for the convention at the commencement of its session a suitable manual, two copies of which were to be furnished to each member. In compliance, a manual in two volumes was prepared under the editorship of Franklin B. Hough.[2] One volume contained a compilation of constitutions, and the other statistics and information regarding finances, the departments of the state government, *etc.* These volumes were not ready at the commencement of the convention's session. For the New York

[1] *Manual for the Use of the Convention.* New York: Walker and Craighed, 1846, pp. 371. See pp. 369–371.

[2] N. Y. *Laws*, 1867, i, 291, 1126. *New York Convention Manual.* Albany, 1867. 2 vols. Hough also prepared, before the convention of 1867, an annotated text of the New York constitution, with the constitutional provisions of other states classified by subjects, and this volume was published upon the order of the convention.

convention of 1894 the secretary of state, attorney-general, and comptroller were required to appoint a compiler "who shall cause to be prepared and ready for said convention, at the commencement of its session, a suitable manual . . . and also suitable compilations for reference. . . ."[1] Under this authority a compiler was appointed, who prepared a manual in ten volumes. Much of the material prepared was useless, and several of the volumes did not appear until the convention had been some time in session. Unwisely, the legislature vested with the compiler control over the printing for the convention, and friction resulted from this arrangement.[2] A convention should not be in any way controlled by those chosen to prepare information for its use. For the New York convention of 1915 provision has been made for a commission composed of the president of the senate, the speaker of the assembly, and three citizens appointed by the governor, to serve without compensation. "Such commission shall collect, compile and print such information and data as it may deem useful for the delegates to the constitutional convention . . . in their deliberations. . . . Such information and data in printed form shall be supplied to such delegates before the opening of the convention, and as soon as practicable after the same is printed."[3]

In 1890 the legislature of New York created a commission whose duty it was to recommend constitutional amendments dealing with judicial organization. Before the report of this commission was acted upon by the legislature, the constitutional convention of 1894 was authorized, and that body profited by the careful investigations and report of the commission. Before the assembling of a convention in any state the legislature should authorize the appointment of an impartial commission

[1] N. Y. *Laws*, 1893, i, 14, 18; 1894, i, 400.

[2] *Revised Record* N. Y. Convention of 1894, i, 293–312. The manual compiled by George A. Glynn was composed of the following volumes: part i, vol. i, Secretary's Manual; part i, vol. ii, Delegate's Manual; part i, vol. iii, Delegate's Diary; part ii, vols. i, ii, American Constitutions; part ii, vol. iii, Foreign Constitutions; part ii, vols. iv, v, Statistics; part ii, vol. vi, New York Constitution annotated; part ii, vol. vii, Government of Cities.

[3] N. Y. *Laws*, 1914, ch. 261.

to investigate the important constitutional problems and to report thereon to the convention.

Apportionment and Election of Delegates

If the assembling of a convention is to be made independent of legislative action after the people have voted that a convention should be held, the details as to its organization and election must appear in the constitution. Where the number of delegates is fixed in the constitution, some existing representative area or body must necessarily be taken as the basis. A number of states provide that a convention shall consist of as many members as the state house of representatives. Some provide that the number shall be not less than that of both branches of the legislature, or shall not exceed that of both branches, or shall equal them, or shall be not less than double the most numerous branch, or shall be twice that of the senate.

A convention is primarily a deliberative body and should not be so large as to prevent the satisfactory performance of its functions. When, as in New Hampshire in 1902–03 and 1912, a convention is composed of four hundred and sixteen members, it becomes too unwieldy for effective work. Michigan, Missouri, New York, and Illinois adopt the senatorial district as a basis of representation, and in all of these states except New York the convention is small enough to be an effective body. In Michigan the constitutional convention of 1907–08 was composed of ninety-six members, and a future convention in that state will be of the same size. In Illinois, under the present arrangement of senatorial districts, a convention would have one hundred and two members. The New York convention of 1894 provided that a future convention should be composed of three delegates from each senatorial district and fifteen delegates at large; in 1884 there were fifty senatorial districts; now there are fifty-one. The New York convention of 1894 was composed of one hundred and seventy-five members. The Ohio convention of 1912 had a membership of one hundred and nineteen.

It has been suggested above that in New York there are fifteen delegates elected from the state at large. The same

number of delegates at large sat in the convention of 1894. In the New York convention of 1867 thirty-two delegates were chosen at large, in such a manner that no elector might vote for more than sixteen.[1] A New York act of 1892, providing for the election of delegates to a convention, made a similar arrangement for minority representation, and also provided that the governor should appoint several delegates to represent labor organizations and the prohibitionists. The act of 1892 was, however, amended in 1893 so as to reduce the number of delegates at large, and repeal the provision for appointed members.[2]

Another question of importance is that as to the filling of vacancies which may occur after delegates have once been elected to a constitutional convention. In conventions there have been a number of elaborate and somewhat theoretical arguments regarding the power of a convention to provide for the filling of vacancies therein, in the absence of constitutional or statutory provision for this purpose. The more sensible view under such circumstances is that the convention may direct an election[3] to fill a vacancy; but to avoid controversy it is best to provide for this matter in the constitution. The Illinois and Montana constitutions provide that vacancies shall be filled in the manner provided for filling vacancies in the general assembly; Delaware provides for the issuance of a writ by the governor; in New York it is provided that the vacancy shall be filled by a vote of the remaining delegates representing the district in which the vacancy occurs, or by the remaining delegates at

[1] N. Y. *Laws*, 1867, i, 286.

[2] N. Y. *Laws*, 1892, i, 810. For a discussion of the political contest in New York between 1886 and 1893 over the calling of a convention, see Lincoln, *Constitutional History of New York*, iii, 3–30. Governor Hill suggested representation in a convention by congressional districts. In the Mississippi convention of 1890 there were fourteen delegates at large; in the Louisiana convention of 1898, thirty-six; in the Alabama convention of 1901–02, fifty-five.

[3] For a summary of the discussions and a somewhat specious argument against the power of a convention, see Jameson, *Constitutional Conventions*, 4th ed., 331–342. See also *Debates and Proceedings*, Ill. Convention of 1869–70, i, pp. 197–208. In the absence of constitutional provision, statutes have in most cases prescribed the manner of filling vacancies.

large, if the vacancy is in the office of a delegate at large; in Michigan the vacancy is to be filled "by appointment by the governor of a qualified resident of the same district." The provisions in New York and Michigan have the advantage of filling promptly a vacancy in a body which will not long remain in session, but the Illinois plan seems the more satisfactory.

A convention should be primarily a non-partisan body, and if the legislature is to be left the power in future to provide for the election of delegates, its hands should be left free to provide for non-partisan nominations and elections. If the election of delegates is to be had independently of legislative action, it is, however, doubtful whether non-partisan elections should be specifically required by the constitution. An Ohio amendment of 1912 provides: "Candidates for members of the constitutional convention shall be nominated by nominating petitions only and shall be voted for upon one independent and separate ballot without any emblem or party designation whatever." This may be a desirable requirement, but our experience has not yet been sufficient to justify placing it in the constitution. However, the only alternative, if the assembling of a convention is to be made independent of legislative action, is to provide for nomination and election under general state laws, but with the proviso that the legislature may enact laws for nomination by petition and for a non-partisan ballot.

Although partisanship should be absent from a constitutional convention, it is not always so. The organization and committee appointments in the New York convention of 1894 were strictly political, and charges were several times made that the convention conducted its work in the interests of the republican majority.[1] The conventions in Mississippi in 1890, South Carolina in 1895, Louisiana in 1898, Alabama in 1901, and (perhaps to a less extent) Virginia in 1901–02, were primarily democratic party organizations, convened for the purpose of carrying out a party policy. In some cases efforts have been made to avoid the aspect of partisanship. Delegates to the Ohio convention of 1912 were nominated by petition, and

[1] *Revised Record*, New York Convention of 1894, i, 144, 213–224; iv, 1258.

elected upon a non-partisan ballot. In the primary nomination of delegates in Michigan in 1907 the party-enrolment provisions of the primary law did not apply.[1] The Delaware general assembly in 1895 recommended "that the two leading political parties of this state make such provision and arrangement as that the members of said convention to be elected from each county be equally divided between the said two political parties." In New Jersey in 1844 a similar plan was carried into effect by means of an agreement between the political parties. It is asserted that in the election of delegates to the New Mexico convention of 1910 party lines were in many cases not observed, but a party alignment was clearly apparent in the convention itself.[2] In Minnesota in 1857 the Republican and Democratic members of the convention organized and met separately, but the two groups in the end agreed upon the same constitution.[3]

Organization and Procedure of a Convention

State constitutions have ordinarily contained few or no provisions regarding the organization and procedure of conventions; and legislative acts, under which conventions have been assembled, have usually not attempted to determine in any detail how conventions should proceed. A constitutional convention should have freedom to determine its own organization and procedure, and few provisions should be inserted into a constitution with respect to these matters. In order to avoid conflicts, which have taken place in several cases, the constitution should, however, make it clear that if legislative action is necessary to assemble a convention, limitations upon the procedure of the convention may not be imposed by legislative act.

If the assembling of a convention is made independent of legislative action, there is much to be said for the plan of imposing no restriction upon its manner of acting, as is the case in Missouri. Some matters, however, need to be determined in

[1] Michigan *Public Acts*, 1907, p. 344, sec. 3.

[2] *Hearings before the Committee on Territories*, U. S. Senate, on House Joint Res. no. 14 (Washington, 1911), p. 23.

[3] Folwell, *Minnesota*, 135–141.

advance of the meeting of a convention, and the provisions inserted into the Michigan constitution of 1908 seem wise:

> A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings, and judge of the qualifications, elections and returns of its members. . . . The convention shall have power to appoint such officers, employes and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. . . . No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal.[1]

Statutes providing for conventions have in some cases sought to limit the time during which they should be in session by providing that members should receive a *per diem* not to extend beyond a certain fixed date. This was done with reference to the New York convention of 1894, the Alabama convention of 1901, and the Michigan convention of 1907–08, all of which sat beyond the time fixed for compensation to cease. The New York and Michigan conventions continued their labor without compensation; the Alabama convention resolved that the pay of its members should continue beyond the time set by the legislature. It is unwise in making provision for compensation to limit the time necessary for effective deliberation or to encourage continuance in session longer than is necessary. A lump-sum payment of one thousand dollars for service as a delegate would probably not be unfair. The Michigan constitution provides: "Each delegate shall receive for his services the sum of one thousand dollars and the same mileage as shall then be payable to members of the legislature, but such compensation may be increased by law." In both conventions and legislative bodies it is difficult to obtain more than three full-day sessions a week, and recesses are taken by every convention, so that a convention may remain in existence for a long period without

[1] New York has somewhat similar provisions. See also the constitution of Delaware.

having a very great number of actual sessions. The Ohio convention of 1912 sat from January 9 to June 7, and had a formal meeting again on August 26 but during this period there were eighty-three daily sessions. With seventy-two daily sessions the Michigan convention of 1907–08 extended from October 22, 1907, to March 3, 1908.

Although a constitution should not contain detailed provisions regarding the organization and procedure of a convention, it may be worth while to discuss here some of the questions which present themselves practically in connection with these matters. The function of a convention is different from that of a regular legislative body. With delegates elected by the people for a specific purpose and with its work submitted to the people for approval, there is no need for the check which comes from a bicameral legislative organization. Having an opportunity to confine itself to one purpose, during a period perhaps equal to that of an ordinary session of the legislature, the prompt expedition of business is not so essential as is careful deliberation. Moreover, political considerations should not be so prominent as they often are in legislative bodies. The above considerations determine to a large extent the organization and procedure adopted by conventions. The form of procedure will, of course, vary somewhat according to the purpose of the convention. If the purpose is merely that of proposing a few amendments to the constitution, as has several times been the case in New Hampshire, the procedure should naturally differ from that in a convention which proposes to submit a complete revision of the constitution, or at least to scrutinize carefully all provisions of an existing constitution.

In the framing of a constitution, it may of course be possible for a convention to conduct all of its work directly in convention; that is, acting as a body, without going into committee of the whole or dividing the work among committees. But such a plan would be cumbersome and unsatisfactory and has not been employed. The plan ordinarily employed is that of using committees. In the use of committees we may say that three methods have been employed: (1) The transaction of business mainly in committee of the whole, with perhaps some smaller

committees appointed to handle particular matters. (2) The appointment of one small committee, with power to draft a proposed constitution and submit it for the consideration of the whole convention, either in committee of the whole or otherwise. (3) The appointment of a number of committees and apportionment among them of the subjects to be covered by the constitution, such committees to report to the convention as such or acting in committee of the whole.

The more usual practice has been for a convention to appoint a number of committees, and to distribute among them the several parts of the constitution, to be considered and reported upon to the convention either in regular session or in committee of the whole. The number of committees appointed for such a purpose has varied considerably, running from four in one case to more than thirty in others.

The number of committees will, of course, vary with the work to be done by a convention, but if all parts of a constitution are to be examined with care, there should be a separate committee for each important subject. Separate committees will also be necessary to deal with questions which are at the time of great popular interest, because an effort will naturally be made to have these subjects dealt with in the constitution. For example, if a convention were assembled in Illinois to-day it would be almost necessary to have separate committees upon the liquor traffic, taxation, the initiative and referendum, and apportionment and minority representation. The New York convention of 1894 had thirty-one committees; the Virginia convention of 1901–02, sixteen; the Michigan convention of 1907–08, twenty-nine; the Ohio convention of 1912, twenty-five. The Illinois convention of 1869–70 had thirty-nine committees, a number much larger than was needed; of these committees, six made no report whatever to the convention. A much more satisfactory distribution of work could have been made in the Illinois convention had there been fewer committees; for example, there were separate committees on canals and canal lands, internal improvements, roads, and internal navigation, which might well have been consolidated into one; and in several cases there were two separate committees to deal with closely related subjects,

both of which were relatively unimportant from a constitutional standpoint. Upon the proper organization of committees and a proper distribution of work among them depends to a large extent the success of a convention.

The size of committees must, of course, vary. The number and size should be such that each member may have some committee service, but each member should not be so burdened as to serve upon four committees, as was practically the case in Illinois in 1869-70; somewhat the same situation existed in the Ohio convention of 1912. The size of a committee must depend somewhat upon the functions which it is to perform. For a convention there may be said to be three types of committees: (1) those on the formal business of the convention, such as committees on rules, on printing, *etc.*; (2) those whose functions are largely technical, such as a committee on arrangement and phraseology; (3) those whose function would be largely that of obtaining agreement upon broad questions of principle, such as might be to a large extent a committee dealing with the subject of municipal home rule. Of course, most committees will have duties of all three types, but some difference in size is justified. Committees of the first type should naturally be small; those of the second type may well be larger, but even for the third type committees having many more than nine members are not apt to work very effectively. The average size of committees in the Illinois convention of 1869-70 was nine. The average size of committees in the Ohio convention of 1912 was seventeen, and because of this the committee work was less effective than it might have been.[1]

Committees are of course organs of the convention, appointed for the purpose of maturing matters for consideration by that body. A committee should therefore at all times be subject to control by a majority of the convention, and should have no power (by failing to report upon any matter) to prevent its consideration by the convention. Abuse of committee power is not apt to occur in a convention, but the rules should be so framed as to prevent the possibility of such abuse. In the New

[1] See remarks of a delegate, in *Ohio Legislative History*, 1909–13, pp. 424–425.

York convention of 1894 there was the following rule: "Whenever a committee shall have acted adversely on any proposed amendment to the constitution, such committee need not report such adverse determination, unless requested, in writing, by the member introducing such amendment, so to do, and it was determined [by the committee] in the affirmative." In the Michigan convention of 1907-08 there was a rule that: "All standing committees before reporting adversely on any proposal shall notify the member presenting such proposal when and where he may meet such committee to explain the same." In the Ohio convention of 1912 there was a rule which read as follows:

> Any time after two weeks from the time when the convention shall have committed any proposal to any committee, a report thereon in the meantime not having been made by said committee, the author of such proposal may, when no other business is pending and in any order of business, demand that such proposal be reported back to the convention; and such demand when so made shall be deemed the action of the convention, and the proposal is at once before the convention subject to all rules of procedure as before. Provided, however, that this shall not apply to a member whose proposal has passed its second reading and has been referred [to the committee on arrangement and phraseology]. The convention by a majority vote may demand forthwith a report of any proposal that has been committed to any committee.[1]

In the Arizona convention of 1910 committees were required to report upon each proposal referred to them, within eight days after the day of reference, unless otherwise ordered by the convention. As a safeguard with respect to committees, the Ohio rule seems desirable, although little use will probably be made of it. The Arizona rule is unwise. Upon any important matter a number of proposals will be introduced and referred to a committee. The committee, in framing a proposed constitutional provision upon the matter should consider all the proposals, and should report upon the matter as a unit. Any rule requiring a

[1] In the New York convention of 1894 and the Alabama convention of 1901–02, any matter might be recalled from a committee by majority action of the convention.

report upon each separate proposal within a limited time would greatly handicap the work of committees. In this connection it should be suggested that the form of committee reports ought to be left to the committees themselves. It has been urged in some conventions that committees should confine their reports to recommended clauses or articles, without giving reasons for such recommendations. Where a recommendation relates to a change in existing constitutional provisions, explanation is, however, often desirable and should be given. A committee report should in all cases indicate what changes in an existing constitutional provision are recommended.[1]

Committees have ordinarily been appointed by the president of the convention, and this is the most satisfactory arrangement. When, however, the person chosen as president is elected because of distinct partisanship the power is apt to be abused. In the New Mexico convention of 1910 the person chosen as president was a railroad attorney, and apparently because of the fear that the convention might be charged with being under the control of corporations, the appointment of committees was vested in a committee chosen by the convention itself. In the Ohio convention of 1912, Mr. Bigelow, who was elected president, was known as a pronounced advocate of the initiative and referendum and the single tax. It was urged, largely for this reason, that the appointment of committees should be vested in a committee of committees, the delegates from each congressional district to select one member of this committee. Mr. Bigelow urged that such a plan would lead to suspicion and disorganization, and promised to act fairly if the appointment of committees were vested in his hands. The appointment of committees was vested in the president, but in the opinion of many members of the convention this power was not used fairly.

The committee must do the detailed work of the convention,

[1] See Jameson, *Constitutional Conventions*, 4th ed., 295–298; and *Debates and Proceedings*, Illinois convention of 1869–70, i, 146. The matter of committee hearings should be left to the committees themselves. A good deal of use was made of hearings by committees of the Ohio convention of 1912. Persons desiring to be heard were required to register their names with the secretary of the convention and to furnish certain other information concerning themselves.

and each committee should have before it as soon as possible all of the proposals relating to the subject which it is to consider. In order to accomplish this purpose, some conventions have definitely agreed that after a certain day no proposals should be entertained, unless presented by one of the standing committees. In the New York convention of 1894 (which met on May 8) propositions introduced after July 15 were referred without printing to a select committee of five, and this committee, if the subject were one already under consideration by a standing committee, was to refer the proposition to that committee without printing; if the subject were one not already under consideration by a standing committee, the select committee was to report to the convention whether in its opinion the proposition ought to be printed and referred to a committee. After August 1 no proposed constitutional amendment could be introduced except on the report of a standing or select committee. In the Ohio convention the rules made the introduction of proposals more difficult after the first two weeks of the session. Members will usually present their proposals as soon as possible, because early introduction may make a proposal more influential, but some rule may be necessary in order that committees shall have all proposals before them in the early days of a convention.

Many convention rules have very properly prescribed the form in which proposals should be introduced, requiring that all proposals be in writing, contain but one subject, and have titles. In the Ohio convention of 1912 all proposals were required to be presented in duplicate. If a convention is assembled to revise an existing constitution, the parts of that constitution should by general rule be referred to the appropriate committees.

With respect to the general conduct of a convention's work, the committee of the whole has been found a convenient instrument. In the Alabama convention of 1901, where this committee was not employed, there was much wrangling over rules and points of order. Objection was made to the committee of the whole, in the Virginia convention of 1901–02, on the ground that its use would lead to repetition of debate upon each sub-

ject, an objection which finds support in the proceedings of the Kentucky convention of 1890–91, but this objection is more than counterbalanced by the simpler method of procedure in committee of the whole. The rules of the Michigan convention of 1907–08 provided that:

> The rules of the convention shall be observed in committee of the whole, so far as they may be applicable, except that the vote of a majority of said committee shall govern its action; it cannot refer matter to any other committee; it cannot adjourn; the previous question shall not be enforced; the yeas and nays shall not be called; a motion to postpone indefinitely shall not be in order; a member may speak more than once. A journal of the proceedings in the committee of the whole shall be kept as in convention.[1]

Most conventions have begun their work practically without limitation of debate, although the previous question has been permitted. In the Michigan convention of 1907–08 any member could move the previous question, but must be seconded by ten members, and it could be ordered by a majority of those present and voting; in the Ohio convention of 1912 a two-thirds vote was necessary to sustain the previous question. In the New York convention of 1894 several rules limited debate. The previous question could be carried by a majority vote, and the committee on rules could when ordered by the convention report a rule limiting debate upon a particular question.[2] Obstructive tactics seem to have been resorted to by the minority in the New York convention, and a rule was finally brought in and adopted denying the ayes and noes on formal and on dilatory motions. The Michigan convention, somewhat late in its session, limited the length of speeches in committee of the whole, and the Illinois convention of 1869–70 found it necessary to adopt a similar limitation. In the South Carolina convention of 1895 the expedient was adopted late in the session of appointing a steering committee to apportion the time and direct the work of the convention. Convention debate should be free enough to allow adequate consideration of every proposal, but if a limitation of

[1] The Ohio convention of 1912 had a similar rule.

[2] *Revised Record*, N. Y. Convention of 1894, i, 215; v, 674, 677, 678; iv, 700.

debate is necessary, the more desirable plan seems to be that of limiting the length of speeches.

In the Michigan convention of 1907-08 the first committee appointed was one on permanent organization and order of business. This committee was afterward made permanent. It reported the plan of committee organization, and made other reports during the session of the convention. One of its recommendations, which was adopted, provided for a weekly meeting of chairmen of committees, to be presided over by the president of the convention, "at which meeting the chairmen of the several committees shall report progress and consider such other matters as may be of interest in advancing the work of the convention."[1] Such a plan if properly carried out should do much to unify the work of a convention.

A committee on arrangement and phraseology is perhaps the most important single committee of a convention. Practically all conventions have had a committee of this type but the name of the committee has varied. In the federal convention of 1787 there was a committee on style, and in the Illinois convention of 1869–70 there was a committee on revision and adjustment. A recess has often been taken by the convention so as to allow sufficient time for the work of this committee. In the greater number of conventions the committee on arrangement and phraseology has been merely an editorial committee, and in some cases fear has been expressed lest this committee change the sense of proposals adopted by the convention. However, a committee is needed to do something more than the mere editorial work of removing inconsistencies in sense and language. The work of a convention is necessarily made up from reports of a number of committees, and the proposals presented will naturally lack consistency in draftsmanship. The committee, on arrangement and phraseology should serve in large part as a central drafting organ to give unity to the work of the convention.

In the use made of its committee on arrangement and phrase-

[1] *Proceedings and Debates*, Michigan Convention of 1907–08, i, 86. In many conventions the committee on rules has also considered the subjects of organization and order of business. Two committees hardly seem necessary.

ology as well as in the general methods of procedure employed, the Michigan convention of 1907–08 deserves brief discussion. Proposals introduced by members were read and referred to the appropriate committee; when reported by the committee they were taken up in committee of the whole, and when reported upon by the committee of the whole were referred to the committee on arrangement and phraseology. The proposal when reported upon by this committee was put upon its second reading, and after second reading was voted upon. If adopted it was again referred to the committee on arrangement and phraseology, which, after all proposals had been so considered, reported the complete revision as agreed upon, the convention taking a twelve-day recess in order to give time for this work. This revision was then considered by sections in the committee of the whole, was reported to the convention, and was then put upon third reading and voted upon by articles and as a whole. This procedure gave four different opportunities for the discussion and amendment of every proposal. But more important, it gave the committee on arrangement and phraseology great influence by allowing it an opportunity to revise the language of each proposal after it was agreed to in committee of the whole and before it was definitely adopted; proposals so revised came again to this committee to be consolidated into a complete constitution. As a result of this care the Michigan constitution of 1908 is the best drafted of recent state constitutions.

A somewhat similar use of its committee on arrangement and phraseology was made by the Ohio convention in 1912. The consideration upon second reading was primarily upon the substance, and thereafter the proposal went to the committee on arrangement and phraseology, and after the report of this committee it was presented for final action. The Ohio committee presented its reports in such a manner that each member of the convention had before him the original form of proposal adopted by the convention, the changes recommended by the committee and the proposal as it would read if such recommendations were adopted.[1]

[1] Letter from Prof. G. W. Knight, of Ohio State University. In the Illinois convention of 1869–70 the committee on revision and adjustment was primarily an editorial

Submission of Convention's Work to a Popular Vote

It lies in the discretion of a convention ordinarily as to whether its work shall be submitted: (1) in the form of separate amendments to an existing constitution; (2) as a complete new constitution; or, (3) as a new constitution, but with separate provisions which may be voted upon independently. The submission of a number of separate amendments to an existing constitution is apt to result in confusion, and although this plan has been employed in several cases, it has usually been thought better to submit a complete new constitution, when the proposed changes are numerous and important. The New York convention of 1894 adopted thirty-one changes in the existing constitution, but submitted a revised constitution, together with two separate propositions. The Ohio convention of 1912 submitted to the people forty-two separate propositions. The plan of submitting a complete new constitution but also at the same time distinct propositions to be voted upon separately, is one frequently employed. The Illinois convention of 1870 submitted eight propositions to the people, beside the question as to whether they approved the proposed new constitution. The plan adopted in Illinois in 1870 seems the more desirable one. Where proposed changes are numerous the bulk of them can best be submitted in a revised constitution, and issues of special importance can readily be submitted so that they may be voted upon separately. In any cases it should be within the power of a convention to determine in what form its work shall be submitted. The Michigan convention of 1907-08 was influenced against the submission of separate propositions, because specific arrangements as to the form of submission had been made by legislative act; and in some states (as in Missouri) a convention is apparently required to submit a revised constitution.

In connection with the vote upon the work of a convention, the most important question is that of bringing the proposals of

committee. Of recent conventions, those of Michigan (1907-08) and Ohio (1912) had the most satisfactory rules. The rules of the New York convention of 1894 should also be referred to, but they were based too much upon partisan considerations. For the Michigan convention, see an article by Prof. J. A. Fairlie in *Michigan Law Review*, vi, 533. For Ohio, see comments in *Ohio Legislative History*, 1909–13, pp. 424, 436.

the convention properly to the attention of the people. Conventions have usually issued an address pointing out the main features of their work, and have provided for the printing of a large number of copies of the proposed constitution, but this is not sufficient.

The legislative act calling the Michigan convention of 1907–08 provided that:

> The convention shall before its adjournment prepare and adopt an address to the people of the state, explaining the proposed changes in the present constitution, the reasons for each change and such other matters as to the convention may seem advisable. Not less than three hundred thousand copies of this address, in pamphlet form, containing the full text of the revised constitution, shall be printed and distributed as the convention shall direct. The board of state auditors is hereby authorized to publish the above address, together with the full text of the revised constitution, in one newspaper in each county in the state having one. . . . choosing for this purpose in each county one of the newspapers having the largest circulation.

The address prepared by the convention was distributed through the post-offices to the body of the voters of the state. The Michigan address contained a careful note to each section of the constitution, indicating the reasons for a change where one had been made, and enabled the voter to cast an intelligent ballot. A somewhat similar plan was adopted in Ohio, and to each proposed amendment was appended an explanatory statement. In some cases the Ohio explanations were not entirely impartial. A careful explanation of each proposal, adopted by the convention, is of value in informing the people of the work of the convention, but it should also be of importance in preventing future litigation in the courts as to the meaning of proposals which may become part of the constitution. In Ohio the address of the convention (with the text of proposed amendments) was sent as a newspaper supplement to all newspapers that would use it, and advertising (together with a facsimile of the ballot) was inserted in two newspapers in each county. When the work of a convention is submitted, it would be desirable to have mailed to each voter the text of proposals, together with explanations. For a populous state this would be expensive, but the expense would justify itself.

WOMAN SUFFRAGE[1]

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THE practice of periodic revisions of a constitution implies a conviction that changes in conditions and in opinion require corresponding changes in the instruments of government. This indicates the attitude of mind in which the framing of a new constitution should be approached. The antiquity of any existing constitutional provisions gives reason for scrutiny rather than for reverence. The absence of a long history for any governmental arrangement affords no argument against its desirability. From this general standpoint, let us consider the problem before the coming constitutional convention with regard to the composition of the electorate.

The convention derives its legal authority from the existing electorate. It presents to them only proposals. The electorate is the legal sovereign body. But an electorate which does not include all persons subject to government may be regarded also as an organ of government as the legislature and the executive are organs of government. It acts for others, not merely for itself. To present to the consideration of an electorate a proposal to share its power with others resembles in some fashion a request to an autocrat to surrender his autocracy. Such a request is hard to a Romanoff. But the suggestion that the existing electorate of New York may view with like mind the question of enfranchising woman seems at once absurd—which is greatly to its credit. Yet the electorate might well ask itself how it came to have this power of decision. Explanations have been given which are reminders of the theory of divine right. Disguised survivals of this generally discarded notion are by no means infrequent. It is well to bear in mind that any governmental mechanism is a human contrivance, subject to such

[1] Read at the meeting of the Academy of Political Science, November 20, 1914.

alteration as human judgment dictates. Those who through the chance of history are vested with power to determine the composition of the electorate may be aided in reaching a wise decision by putting themselves in the mental attitude of one who is called upon to construct for the first time a government of a community of which he is not a member. Our minds would be more untrammeled in considering the problem if we assume a situation in which all the governed are asked to select an electorate, and ask ourselves whether under such circumstances it would be rational to make discriminations solely on the basis of sex.

The convention should find it comparatively simple to view its tasks objectively. Before deciding to submit a proposal, it need not be convinced that the proposal should be adopted at the polls. But it would be folly to burden the electorate with every proposal that any one might suggest. The convention must therefore give thought to the importance of the problem of qualifications for voting and must weigh the relative merits of opposing points of view.

No argument is needed to establish that the composition of the electorate is a matter of vital importance to government and to society. If important for no other reason, it is important because people think it so. It is interwoven with long-cherished ideals of government. And in the light of such ideals it invites our consideration.

Among the general statements which meet with wide acceptance is the assertion that all governments derive their just powers from the consent of the governed. This is not a statement of an historical fact. It is a statement of a conceived ideal. But it is a statement of an ideal that few are heard to deny. There are fine-spun theories about consent which insist that some one else knows my desires better than I can know them myself, as there were fine-spun theories about representation, when the Declaration of Independence made reference to the consent of the governed. But we seldom hear it baldly stated that the highest ideal of government is one which subjects one-half of the adult population to a coercion in whose formation and direction they have no personal share.

This ideal of a government based on the consent of the governed is of course one that cannot be attained in respect to every concrete coercion which a government may ordain. But in a large and very real sense, it can be attained. The foundations of government can rest on a suffrage in which all normal adult members of the body politic participate, whatever things may come to pass which some of the governed do not desire.

But no single ideal, however widely held, is necessarily a controlling principle of action. It is the fashion of the human mind to express its ideals in absolute terms. But when we undertake the task of realizing any given ideal, we soon discover that our steps have relation to other ideals as well, and that the attainment of one may be at the cost of another. Many who would prefer to have all government rest on the consent of the governed may nevertheless deem other ends more important. And they may believe that the attainment of these other ends necessitates the exclusion of a large portion of the governed from the exercise of political authority. In considering whether women should be admitted to the governing class, it behooves us therefore to give thought to the ideals which influence those who would exclude them.

There are many arguments advanced against woman suffrage which it is difficult to relate to any general concept worthy of the name of an ideal. But some of the arguments disclose at least two ideals which seem to stand forth distinctly. One is indicated by the dictum that the best government is that which is most efficient; the other, by the assertion that the welfare of society demands that women be relieved from as many burdens as can be borne by others. And so we are told that the women would hurt the ballot and that the ballot would hurt the women.

The belief that an enlargement of the electorate will result in less desirable government is not a new one. There have always been those to urge that the best government is one directed by some selected group which by reason of training and demonstrated capacity is deemed the wisest in the community. Such is the argument advanced by those who favor any form of aristocratic government. But to such arguments we have in the past turned a deaf ear. Restrictions on the legal right of suffrage

have been progressively modified. An unenfranchised class has always proved a source of disturbance. Control by the few has not proved a satisfactory safeguard of the interests of the many. With only one important exception, no extension of the franchise has been subsequently modified. This one exception was a sudden addition to the electorate of a despised and ignorant race, an addition forced upon a community entirely against its will. The most violent opponent of woman suffrage will hardly adduce the results of the Fifteenth Amendment as apposite to the question under discussion. With the exception referred to, the fears of those who have opposed an extension of the suffrage have signally failed to find realization after the extension has taken place. In the New York constitutional convention of 1821, Chancellor Kent, in opposing the removal of property qualifications for suffrage, urged that it would result in inequality of taxation, the abuse of liberty, the oppression of minorities, the disturbance of chartered privileges, and the degradation of justice. "I hope, sir," he said, addressing the convention, "we shall not carry desolation through all the departments of the fabric erected by our fathers. I hope we shall not put forward to the world a constitution such as will merit the scorn of the wise and the tears of the patriot." His hope has been realized—though not as he desired.

America seems thoroughly committed to the enterprise of manhood suffrage. To this extent the consent of the governed is no longer merely a conceived ideal. It is a recognized principle of action. If the participation of all men in the suffrage conflicts with the ideal of efficient government, that ideal must be regarded as relinquished. But the sounder analysis is, I take it, that we have come to believe that the highest efficiency demands such participation, demands that those who are affected by what government does shall in some fashion be consulted. We are still in the throes of doubt as to how far any electorate should actually direct government. We find the same individuals insisting that an electorate can not wisely choose between candidates for more than three offices, and that an electorate should pass judgment annually on all the propositions that one-tenth or one-fourth of their number may insist on submitting to

them. It is important to reflect how far any reason presented for excluding women from the electorate is more properly a reason for limiting the function of the electorate, however composed.

If, then, universal manhood suffrage is not to be weighed against, or does not conflict with, the ideal of efficient government, we have to consider whether universal adult suffrage stands on any different plane. The battle wages too fiercely elsewhere for us to skirmish here. Many of the efforts of those opposed to woman suffrage are directed against extravagant claims that the addition of women to the electorate will bring the millennium. And most of the other arguments of the exclusionists on this point are arguments equally valid against basing government on the consent of all the men. The evils which have followed in the wake of universal adult suffrage in the states which have adopted it closely resemble the realization of the predictions of Chancellor Kent as to the results of universal manhood suffrage.

We turn now to the relation of the enfranchisement of women to certain cherished ideals of womanhood. It is insisted that the ballot is a burden, and that to relieve women from that burden is to their advantage and the advantage of the race. No corresponding argument has been made, so far as I recall, with regard to men. It is conceded that the ballot imposes obligations and responsibility. So does going to school. And there is a wide belief that the burden of the ballot has the same advantages for those who bear it as has the burden of the school. It is usually in some disguised form that *dolce far niente* is preached as a high ideal of individual life. We are not wont to bestow our respect on those who shrink from any task merely because it involves obligation and responsibility. And we do not honor others by wishing for them a relief which we should blush to ask for ourselves, unless, indeed, they are so differently circumstanced as to have a justification for that relief which we cannot claim. It is difficult to see how the act of putting a piece of paper into a box, or the preliminary thought necessary to mark that paper intelligently, imposes any burden which the finest consideration would desire to spare those worthy

of our respect. The pith of the whole matter has been stated by Dr. Crothers in three brief propositions:

> That equal suffrage is not the first step in an impending revolution, but only a necessary adjustment to a revolution that has already happened.
>
> That a voter does not vote all the time, but is allowed a number of days off in order to attend to his private business.
>
> That women in expressing their opinions should be allowed to be as modest and unobtrusive as men.

This third proposition Dr. Crothers elaborates in characteristic vein:

> The vote is . . . a kind of petition; it is an expression of personal desire and preference. In this . . . sense there is nothing which the most careful person could object to as unbecoming in a woman. As a matter of fact, women have always expressed their preferences, often in a most decided manner. . . .
>
> A woman may express her opinion in any way that is personal and obtrusive. . . . The woman who does not object to ostentatious methods has already ample opportunity to make her opinions known and her influence felt. But there are great numbers of women who are thoughtful but who shrink from publicity.
>
> Why should not the quiet stay-at-home women have the same means of expressing themselves which are allowed to the quiet stay-at-home men?

It is not to be inferred from the form which this discussion has taken that all that can be urged against the arguments of the anti-suffragists is that neither woman nor government will suffer if the women are enfranchised. Strong grounds exist for believing that, contrary to the fears of the exclusionists, the women will help the ballot and the ballot will help the women. The arguments are too familiar to be repeated here. In weighing the arguments on both sides, a word of caution is pertinent. We must guard against the error of dealing with women as a class, of which, for all purposes, we may postulate characteristics common to all its members. Women differ from men in physical characteristics. If in these times the importance and

effectiveness of the individual vote depended on individual physical strength behind it, this would be important in considering whether women should be enfranchised. It might require us to disfranchise the invalids and the aged among the men. The difference in physical capacity between men and women might be important if political issues were to be decided on sex lines. But no one can seriously believe that this is possible. Those who treat woman as a class, from the standpoint of suffrage, must therefore show that most women differ from most men in ways which relate to their capacity to do what men do when they consider how to vote and when they go to the polls. The attempt to establish such differences is made by suffragists and anti-suffragists alike. In both cases it seems equally futile. Only by reason of circumstances does any sane advocacy of the expansion of the electorate to include all the normal adult members of the community seem to be urging the enfranchisement of women as a class. It is rather an objection to the exclusion of women as a class, solely by reason of their sex. And that this discrimination and exclusion are not destined long to continue is widely conceded. The abolition of disfranchisement solely on the ground of sex is too plainly the next logical step in the experiment of democracy which America has undertaken.

What then should be the attitude of the coming constitutional convention towards making possible the abolition of distinctions of sex in the composition of the electorate? The powers of the convention are limited. It passes no final judgment. Its sole function is to formulate and present proposals. And these proposals must be directed to the existing electorate, not to all the governed, nor to the women. Legal precedents which the court of appeals would be certain to esteem deny the authority of the convention to refer any matters to any group not now clothed with political authority. It may be remarked, however, that the framers of the constitution of the United States were not thus solicitous of existing legal methods of changing the fundamental law. But no one suggests that the coming convention emulate this example of the Fathers. It is clear that it will choose one of three courses. It may decline to submit any proposal to enlarge the electorate; it may make no mention of

sex in any clause relating to the electorate; or it may present by a separate proposal the question whether woman shall vote on the same terms as men.

It is inconceivable that the convention should offer the electorate no opportunity to pass upon this question. It would be a gross abuse of delegated authority to decline to submit in some fashion a question so prominent in public discussion. The convention is certain to heed the widespread public opinion that has passed beyond the stage of mere argument and found expression in the constitutions of more than one-fifth of our states and in the proposed amendment to the constitution of this state, already once passed by the legislature and commended for submission in the platforms of our political parties.

The only alternatives which the convention has seriously to consider are whether to incorporate in the body of the constitution a provision enfranchising women, or to submit the question by a separate proposal. The wisdom of choosing the latter course is obvious. The constitution must necessarily deal with too many other matters of grave importance to imperil its ratification by the inclusion of a provision which still provokes wide difference of opinion. The question of the composition of the electorate is one which can most easily be isolated. In those instances where it is deemed best to make other political rights or duties coincident with the right of suffrage, the constitution may employ the term "elector," leaving for subsequent determination the scope of the term.

Much might be said in favor of a provision vesting the legislature with power to endow women with the right to vote at all elections as it now may confer that right for some elections. Such arguments would be conclusive if the process of amending the state constitution were as difficult as that of amending the constitution of the United States. But in view of the comparative ease of amending the state constitution, and in view of the fact that qualifications for voting are connected with the very foundations of the government, the question seems one for the determination of the highest political authority of the state.

Suggestions have been heard which point to one other conceivable course for the convention. It might submit to the

electorate for its approval a plan to refer the suffrage question to a plebiscite in which both men and women are included. By this plan all the adult governed would be given an opportunity to determine who shall be the governors. This expedient, however, seems less desirable than some plan for the immediate vesting of legal authority in the governed, leaving to the thus newly-constituted electorate the continuing power to impose restrictions upon the exercise of the franchise. Once all the governed possess legal authority, future limitations of that authority will have a basis incomparably firmer than the basis of any existing limitations. The determination of the desirability of any proposed restrictions can be reached with greater wisdom after the benefit of the experience of the actual working of universal adult suffrage. Then only can we know how well grounded are the apprehensions of the modern counterparts of Chancellor Kent.

THE CONSENT OF THE GOVERNED [1]

MUNROE SMITH

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THE question whether women shall vote appears to me to be a question of social and political expediency. It is not, I think, to be settled by the citation of any such aphorism as that which bases the powers of government on the consent of the governed. Political aphorisms, even when they are formulated in the interest of progress, are always based upon preceding developments. Like legal maxims, they are always broader than the range of cases they were first framed to cover, and their application to new and different cases is always disputable. To say that they have come to represent social and political "ideals" is to beg the question whether their application should be extended.

I

"The consent of the governed" has meant, historically, the consent of those who were actually or potentially fighting units. Voting was invented, in early communities, to find out whether the rank and file of fighting men would or would not support action proposed by their leaders. That was the whole significance of the weapon-clash in the early Teutonic assembly and also of the more elaborate voting by tablets in the assemblies of the ancient Mediterranean city-states. Whether the modern referendum means anything more is at least a debatable question.

These early assemblies consisted of the active army and the veterans. As soon as a young man was armed he became a voter. In the Teutonic assembly and in the earliest Roman assembly the voters appeared with arms in their hands. In the Roman assembly they voted by companies of horse and foot. In a later organization of the Roman assembly, the

[1] Discussion of woman suffrage at the meeting of the Academy of Political Science, November 20, 1914.

citizens voted by local districts or wards; but so long as all free Romans were held to military duty, they all voted. When the Roman armies became mercenary forces, their commander and paymaster became lord of the Roman world and voting disappeared.

In the medieval and modern history of Europe, the proportion of the population whose consent must be obtained in the operation of government has broadened or narrowed with the right and duty of exercising armed force to protect the frontier, to maintain internal peace, and to secure submission to the law. In the eighth and ninth centuries of the Christian era, when the tribal armies of Western Europe, fighting on foot, were unable to resist the Moorish horsemen and it became necessary to meet this light cavalry with a superior heavy cavalry, knight service became the basis of political power. Those who furnished bodies of knights were the only persons whose consent was important. When at a later period a new and efficient infantry was developed, first in the shape of pikemen, and then, after the invention of gunpowder, in the shape of musketeers, the cities which could equip such forces began to count politically; and when, as in many of the cities, the duty of defending the walls as well as that of maintaining the internal peace was imposed upon all able-bodied male citizens, democratic government reappeared. When, at the close of the middle ages, some of the kings and princes, by taking money in lieu of feudal services and by developing other fiscal rights of the crown, were able to hire and equip bodies of soldiers which replaced the feudal and city troops, they were in a position to dispense with the express consent of any of their subjects. In the nineteenth century, when the hired armies were replaced, first by volunteer armies, then by drafted armies, and finally by armies based on universal military training, the manhood suffrage of the early tribe reappeared in Western and Central Europe.

In England the line of political development was somewhat different. Here the monarchy was never able to break the power of the feudal aristocracy so completely as on the continent; and the great landed estates, although freed from feudal

duties, retained the power they had formerly earned by service. Naturally, under these circumstances, the theory developed that the parliamentary franchise existed to protect property; it was even asserted that the state was based on property; and the gradual widening of the suffrage in the nineteenth century was based on the claim of other economic interests to their share of political power. These English theories we inherited or borrowed, and they were largely invoked in the early part of the last century by those who supported property qualifications and opposed the demand for universal manhood suffrage in the United States.

To-day, however, alike in England and in the United States, suffrage may be regarded as resting, in principle, on the historic basis of armed service that may be exacted; not alone upon the duty of service in foreign or civil war, but also on the duty to maintain the peace and to aid in the enforcement of the law. Under our national and state laws every male citizen within certain age limits may be called upon for such service. This duty is a more defensible basis of suffrage than the protection-of-interest theory. This latter theory assumes that, in some mysterious way, general social interests will be realized through the clash of conflicting class interests. It seems certain, on the contrary, that social interests are effectively secured only through the subordination of class interests to the general good.

II

It must be conceded that the antiquity of any social or political arrangement affords no conclusive proof of its continued necessity. In course of time all such arrangements are sure to be superseded or modified. At any given time, however, there is at least a presumption in favor of the existing system. As far as we can judge from history, social progress demands, at any given time, the modification of only a relatively small part of the entire social order. Even in such periods as the late Roman Empire and the old régime in France, the great majority of the existing institutions, laws and customs were well adapted to contemporary conditions; and what was swept

away in the Teutonic conquests of the fifth and sixth centuries and in the revolutions of the eighteenth and nineteenth centuries was far less important than what persisted. The perennial belief of the radical reformer that the greater part of the social order needs to be changed, and that there is a presumption against any existing institution in proportion to its antiquity, springs from the concentration of his attention upon the things which he dislikes. This very concentration causes him to overlook the far more numerous things with which even he is content.

The presumption in favor of an ancient institution is nevertheless one that may be overthrown by evidence; and it is always legitimate to inquire whether it is not now antiquated. The historical argument in favor of manhood suffrage is commonly met by the assertion that conditions have changed. In the middle of the last century it was claimed that human society had passed from the militant to the industrial type of organization. During the last fifty years, however, the civilized portion of the world has been more militant than during the preceding fifty years. At present it is claimed, more vaguely, that we have at least emerged from the period when the state should be viewed as the organized force of the community and law should be regarded as an enforceable system of order.

This claim rests, unfortunately, rather on aspirations than on facts. There is really no evidence that the nature of the state or that of law has materially changed. I do not assert that the state has ever been based on force alone. On the contrary, I emphatically repudiate any such theory. Even in the earliest stages of political organization, economic interests and what we may fairly call ethical forces have played an important part. It is nevertheless true that until the physical force of the community is brought under central control there is no state; and whenever this central control ceases to exist the state is in abeyance. That is to-day the condition of Mexico. When in November, 1914, President Gutierrez announced that the agreement between the leaders of the warring factions at Aguas Calientes had re-established "the government of the

people," he of course meant government by the consent of those people whose consent counted; and we must admit that, if the agreement had been generally and loyally observed, it would have gone far to re-establish the Mexican state.

It is still true, moreover, that force is the characteristic and proper implement of the state—the means by which the state realizes its purposes. That the state requires this implement in its international relations, and will probably require it for an indefinite future period, need hardly be argued to-day. Visions of universal peace appear only after long periods of peace. And it is quite clear, as Mr. Roosevelt has recently said, that if international war is ever to disappear, it will be suppressed through international federation and the development of an efficient international police. Even in the world state armed force will be required.

In the internal operation of government, also, force is still the characteristic and proper tool of the state. So far from being true of early forms of state alone, this becomes increasingly true in proportion as society grows more civilized and the state attains its highest development. An imperfectly developed state permits physical coercion by groups and associations within its territory. The fully developed state restricts the use of physical force, except by individuals in self-defense, to its official agencies: it asserts complete monopoly of force.

In our conception of law, again, the potential support of physical force cannot be disregarded. I do not assert that the substance of legal rules has at any period been determined by physical force; might has never made right. I maintain, however, that the rule that cannot be supported by physical force is not law, and is not any more like law to-day than in the earliest stages of legal development. A proposal to make a law involves two considerations: first, is the proposed rule desirable? second, shall it be supported by physical force? The first question is usually determined before voting begins. It is settled by all those complex processes through which public opinion is formed. In the formation of public opinion women have always played an important part. It is only in answering the second question that they have no voice.

From these points of view, it seems wholly reasonable that the determination of state policy and the making of law, directly or through chosen representatives, should be left to that part of the community which may be called upon to support the policy or to enforce the law with arms. Broadly—and all social arrangements are necessarily made on broad lines—this means that such matters should be left to the adult males.

III

So long as force plays any part in the determination of policy, in the operation of government and in the maintenance of the legal order, there is possible and even probable danger in the inclusion of women in the electorate. We are accustomed to think that when we have voted, the defeated party must necessarily accept the result. The earliest method of counting votes was probably by division. The division was probably, at the outset, a line-up for a fight, and the submission of the shorter to the longer line was due to ocular demonstration that resistance would be hopeless. To-day we come nearest to such a demonstration when we hold a referendum, submitting a proposal to the direct vote of a masculine electorate. But under the representative system it is not always certain that the victorious party is really a majority. And when, as sometimes happens, the struggle is one in which important sectional or class interests are at stake and party feeling rises to passion, if the defeated party does not believe that the victorious party really possesses superior physical force, there is serious risk that it will resort to the wager of battle. In our own country, in 1860, Lincoln had a majority in the electoral college. The Southerners knew, however, that he was a minority president, and they declined to accept the result. In England, in 1913, an Irish home-rule bill was passed by a considerable parliamentary majority. The men of Ulster and the Unionists asserted that this majority in Parliament did not represent the majority of the men in Great Britain. A referendum was suggested to test the point, but it proved impossible to carry such a proposal through Parliament. James Russell Lowell once said that voting was counting heads in

place of breaking them. Here was a case where the count could not be made and the breaking was imminent. It seems highly probable that civil war was averted only by the outbreak of the European war.

We are accustomed to think, again, that laws and judgments of courts are practically self-executing. This impression is in part due to the fact that the more perfect our administrative machinery becomes, and the more certain it is that force will be used if it be needed, the less often is it necessary to use force. But when class interests are involved and class feeling runs high, obedience to the law is by no means assured. In some of our states the struggle between employers and employed is so keen as to amount to continuous latent war; and not infrequently it comes to open war. A similar situation exists in some of our states in consequence of race hostility.

When the results of an election are peacefully accepted by the defeated party, and when laws and judgments appear to be self-executing, it seems highly probable that acquiescence still depends to some extent upon the conviction that resistance is hopeless. If now we inject into the electorate that portion of the adult population which does not represent fighting force —which was taken off the fighting line when men advanced from savagery to barbarism—what will be the effect upon the men who have been defeated in elections or who object to the enforcement of particular laws? Their disposition to acquiesce will certainly not be increased. How far it will be lessened depends on two further questions. The first of these questions is whether, in any given case, these men are likely to believe that the election was carried or the law established by the votes of women rather than by those of men. Where this is not ascertainable, they may choose to believe whatever they wish to believe. The second and more fundamental question is, how far the most civilized nations of the present day have emerged from barbarism and become wholly and sweetly reasonable. It is not until this last evolution is completed that men will always and unhesitatingly accept a vote as an expression of the social will, ceasing to ask or to care how much force there is behind the will.

RECENT EXPERIENCE WITH THE INITIATIVE, REFERENDUM AND RECALL

CHARLES FREMONT TAYLOR

Editor of *Equity*, Philadelphia

WHEN we realize that the constitution of every state in the Union, except Delaware, has been adopted by referendum to the voters of the respective states, we see that the referendum is no new thing. When we realize that every amendment to every state constitution, except that of Delaware, has been adopted by referendum to the voters of the respective states, and that at every general election new amendments are submitted either by action of the legislature or by means of the voters' initiative in one or more states, we see that the referendum is a "going concern." As an illustration, amendments more or less numerous were referred to the voters at the recent election, November 3, in the following states, the number in parenthesis following the name of each state denoting the number of amendments submitted: Arizona (5), California (30), Colorado (8), Georgia (10), Kansas (2), Louisiana (17), Michigan (4), Mississippi (9), Missouri (11), Nebraska (4), North Dakota (6), Ohio (4), Oklahoma (4), Oregon (20), South Carolina (11), South Dakota (8), Texas (3), Washington (1), Wisconsin (9), Wyoming (4), and Arkansas—September election—(3).

However, by no means all of these submissions were in the so-called initiative and referendum states. Of the states mentioned above, the voters' constitutional initiative does not exist in the following: Georgia, Kansas, Louisiana, Mississippi, North Dakota, South Carolina, Texas, Washington, Wisconsin, and Wyoming.

Hence the amendments in these states were submitted necessarily in the old-fashioned way; that is, by the legislatures.

Amendments by Both Processes

The remainder of the first-mentioned states have the voters' constitutional initiative, by which the voters can, by petition, initiate constitutional amendments. But the legislatures also continue to submit amendments in these states. We give here the number of amendments submitted by each process in these states for this year's election:

	By initiative	By legislature
Arizona	5	
Arkansas	1	2
California	8	22
Colorado	5	3
Michigan	1	3
Missouri	3	8
Nebraska	1	3
Ohio	4	
Oklahoma	4	
Oregon	11	9
S. Dakota		8
Total	43	58
To the total here given by legislature, we must add the 72 amendments submitted by the legislatures in those states which have no other process		72
		130

This gives succinctly the recent referenda of state constitutional amendments, which may be summarized as follows. By simply adding we find the following totals: 130 amendments were submitted by the old process of legislative submission, and 43 were submitted by the voters' initiative, that is, by petitions. It is evident that the old process of submitting amendments is still active, even in the states where the voters have the privilege of initiating constitutional amendments. Thus we see also that the voters' constitutional initiative has not been abused, as was feared by some anxious statesmen and educators lacking confidence in the people. If abuse is here indicated, it is by the legislatures and not the voters. In an article contributed by Governor Glynn to the *New York Times* for October 25, 1914, the statement is made that in New York state since 1895 over 600 proposed amendments to the consti-

tution have been introduced into the legislature. No such activity by means of the voters' constitutional initiative has ever been known.

The official returns on constitutional amendments from the secretary of state of South Carolina arrived just as this article was needed for the press. The surprising data that he presents illustrate the imperfections of many of our state constitutions. The total vote for governor was 34,606 for Manning, Democrat, and 83 for Britton, Socialist. Seemingly there were no other candidates for governor.

Eleven constitutional amendments were submitted.[1] Though

[1] The following were the amendments and the vote thereon:

Amendment to Article X, State Constitution, empowering the cities of Sumter and Darlington and the towns of Belton and Walhalla to assess abutting property for permanent improvements. Total vote, 2,754; for, 2,089; against, 665.

A Joint Resolution to amend Section 8, Article II, of the Constitution, by adding thereto, on line three, after the word "College" and before the word "the" the following: "South Carolina School for the Deaf and Blind, located at Cedar Springs." Total vote, 13,924; for, 10,730; against, 3,194.

A Joint Resolution to amend Section 7, Article VIII, of the Constitution, relating to Municipal Bonded Indebtedness, by adding a proviso thereto, relating to the School District of Yorkville. Total vote, 10,607; for, 5,324; against, 4,283.

A Joint Resolution proposing an amendment to Article X of the Constitution, by adding thereto Section 16, to empower the Cities of Florence and Orangeburg and the Town of Landrum to assess abutting property for permanent improvements. Total vote, 10,267; for, 5,971; against, 4,296.

A Joint Resolution to amend Section 20, Article III, of the Constitution, by adding thereto the following: "Except where there is only one candidate nominated for the place to be filled at such election, in which case the election shall be *viva voce* without any roll call." Total vote, 9,478; for, 5,348; against, 4,130.

A Joint Resolution to amend Section 7, Article VIII, of the Constitution, relating to Municipal Bonded Indebtedness, by adding a proviso thereto as to the City of Florence. Total vote, 9,018; for, 5,455; against, 3,563.

A Joint Resolution to amend Section 7, Article VIII, of the Constitution of this State by adding a proviso thereto so as to empower the Cities of Chester and Sumter each to issue bonds to an amount not exceeding fifteen per cent of the assessed value of the taxable property therein for the improvement of streets and sidewalks. Total vote, 8,998; for, 5,273; against, 3,725.

A Joint Resolution proposing an amendment to Article X of the Constitution, by adding thereto a section to be designated as Section 15a, to empower the Towns of Latta and Dillon to assess abutting property for permanent improvements. Total vote, 9,485; for, 5,606; against, 3,879.

A Joint Resolution to amend Section 1, Article XII, of the Constitution, by

most of them dealt with matters of small consequence, and many were of only local application, yet the constitution of the state itself made it necessary to submit them to the voters of the entire state and to embody them in the constitution. It is obvious to any student of government that these are purely legislative matters, and most of them should be settled by local legislatures. The voters of South Carolina cannot order a measure of any kind to be put on the ballot, but the legislature must put these trivial matters on the ballot.

But South Carolina is not alone in palpable constitutional imperfections. The following were some of the measures acted upon by the Massachusetts state legislature in the session of 1913:

That Boston may appropriate for Museum of Fine Arts.
That Boston may appropriate for Boston Opera House.
On expenses of Cambridge Department Public Safety.
For reorganization of Boston School Committee.
That Boston police have a day off in eight.
On playgrounds of Worcester.
On automatic sprinklers in Boston.
On salaries of Boston Licensing Board.
For police commissioners and license board in Chelsea.
For inclosed athletic field in Chelsea.
That Malden and Medford may make contracts as to sewage disposal.
That Dennis O'Keefe be restored to Boston Fire Department.
That Brockton may pay annual salary to members of city council.
That Boston may pay annuity to widow of J. J. Lehan.
For controller of acounts in Newton.

striking out the words "Blind, Deaf and Dumb" after the word "Insane" on line two, and before the word "And" on line two. Total vote, 11,617; for, 8,217; against, 3,400.

A Joint Resolution proposing an Amendment to Article X of the Constitution, by adding thereto Section 17, to empower the Town of Fort Mill to assess abutting property for permanent improvements. Total vote, 9,041; for, 5,289; against, 3,752.

A Joint Resolution proposing an amendment to Article X of the Constitution, by adding thereto Section 16, to empower the Cities of Anderson, Greenwood and Towns of Bennettsville, Timmonsville and Honea Path to assess abutting property for permanent improvements. Total vote, 9,386; for, 5,373; against, 4,013.

For day off in seven for Boston police.
For a boys' camp in Franklin Park, Boston.
On approval of certain Quincy streets by mayor and council.
That Lynn may give cemetery lot to Relief Association of Fire Department.
To abolish Fall River Board of Police, *etc.*, and election of board.
That Pittsfield may grade streets, *etc.*
That Quincy may change method of sewer assessment.
That Worcester may set aside sites for waiting stations.
For one day off in eight for police in Chelsea, Revere and Winthrop.
That Salem Police Relief Association members may continue members when not police.
That Boston may pay sum to Patrick E. Kearns.
To put Warren H. Brown on Boston pension list of firemen.
That Worcester may take land to widen Madison Street.
For widening Bridge Street, Salem, *etc.*
That Lynn may pay sum to James S. Kennedy.
That Holyoke may pay sums to widows of P. J. Riley and James Lynch.
That police matrons in cities and towns may be pensioned.
To encourage shipping and manufacturing in Cambridge.

This shows the need of a home-rule provision in the Massachusetts constitution by which all such matters may be determined by the respective localities affected. Then the Massachusetts legislature could have shorter sessions, and biennial instead of annual ones.

Statutes Initiated and Referred

In some states statutes may be initiated by voters' petition; and usually these same states possess the voters' statutory referendum. That is, a reasonable number of voters may, by petition, initiate a law, or suspend the operation of any law passed by the legislature until said law is ratified by direct vote. In either case the direct vote on the initiated or referred statute is taken "at the next general election;" and if it receives an affirmative majority of the votes cast thereon, it is confirmed and becomes law; but if a majority of votes cast thereon are negative, the initiated law is defeated, or the pro-

posed law which passed the legislature is vetoed. This last is sometimes called the voters' vetc.

Legislatures have, of recent years, formed something of a habit of submitting proposed statutes to a referendum. Proposed statutes, either by the voters' initiative or by the voters' referendum or by the legislative referendum, were voted upon in the following states on November 3, the number and the process of submission being given:

	Voters' initiative	Voters' referendum	Legislative referendum
Arizona	9	4	
Arkansas	2		
California	9	4	5
Colorado	3	5	
Massachusetts			3
Missouri		4	
Nebraska	1	2	1
N. Dakota			1
Oregon	8		1
S. Dakota	3		1
Washington	7		2
Total	42	19	14

To sum up the statutes, we have: Total, 75; statutes submitted by the voters' initiative, 42; statutes submitted by voters' referendum, 19; statutes submitted by legislatures, 14. This, in a general election all over the country, does not show feverish activity in the line of direct action. There is certainly no abuse here of the recently obtained powers by which voters can demand direct action. This moderation is emphasized by the facts in the next paragraph.

All the way from 500 to 3,000 laws, resolutions, *etc.*, are passed in every state during the average legislative session; and a great many more are introduced and considered but fail of passage. So we see that the measures placed before the voters by means of the popular initiative and referendum are comparatively very few indeed. It is fitting that this should be so, for the initiative and referendum are not intended to supplant representative government, but only to restrain it when it is wrong and to supplement it when it is deficient.

Though the number of measures thus submitted be small, they may be important. Certainly the psychological influence upon legislators of the possibility of the initiative or referendum is important; restraining them from doing what the electorate does not want, and stimulating them to pass laws that the electorate does want.

The returns of the election on November 3 on referred measures are as yet very meager. The various secretaries of state say that the official count will not be complete until about the close of this calendar year.

State-Wide Recall

At least seven states now have the state-wide recall: Arizona, Arkansas, California, Colorado, Michigan, Nevada and Oregon. (Louisiana was added to this list on November 3, 1914.) The state-wide recall has never been called into use.

Local Use of the Initiative, Referendum and Recall

Now let us turn to the local use of the initiative, referendum and recall. In this country there are over 350 municipalities that have the commission form of government. Nearly all of these have the initiative, referendum and recall, and some municipalities not under the commission form of government have these powers. A majority (at least 200) have all three of these powers, while some have the initiative and referendum without the recall. A nation-wide investigation of all these municipalities for all the time that they have possessed these powers discovered that only 31 had used the initiative, 26 the referendum and 33 the recall. It will be seen that the recall has been used for local purposes as freely as the other powers, but not for state purposes; while the other powers have been used rather freely for state purposes. Further, concerning the local recall, 25 attempts have been made, but failed on account of the promoters not being able to get a sufficient number of signatures. This indicates that the securing of recall signatures is not so easy as some theorists seem to believe. Of the 33 recall elections actually held, 20 resulted

in recall and 13 resulted in reëlection of the official sought to be recalled.[1]

The above results show a striking conservatism on the part of voters. They do not abuse these enlarged powers, but use them to good purpose when there is occasion. The corruption that a few years ago made municipal government in America notorious the world over would have been impossible if the voters of all municipalities had possessed the initiative, referendum and recall.

The above facts demonstrate that the voters, in both state and municipal matters, are very moderate and conservative in their use of these new powers which they have reserved to themselves only in comparatively recent years. They show that there is no basis in fact for ex-President Taft's statement: "I want to show the young men of this country the absurdity of having weary armies of voters tramping frequently to the polls—at the call of would-be reformers—in a struggle for incessant changes in the laws." No state or municipality in the writer's knowledge having once obtained these powers has ever given them up. Occasional use of these powers has had a salutary influence on public officers, and their use has quickened the interest of voters in public affairs. The movement to place these powers in municipal charters and in state constitutions goes steadily on; and it will not, must not, stop until these fundamental powers of the people are placed in the charter of every municipality and in the constitution of every state.

The large number of constitutional amendments submitted to the voters this year, and every year, mostly by legislatures, indicates a dissatisfaction with our present state constitutions. A great evil is the proposal of much purely statutory matter for incorporation into constitutions, evidently in order to give it greater permanency than statutes. Some means should be found to confine state constitutions to the "frame of govern-

[1] For full details, see Municipal Initiative, Referendum and Recall in Practice, by the present writer, in the *National Municipal Review* for October 1914.

ment." Then the voters would seldom be called upon to vote on constitutional amendments. The facts given in the first part of this article show this to be a greater cause of the "electoral fatigue" complained of by ex-Mayor Matthews, of Boston, than the initiative, referendum and recall.

A state constitution limited to the "frame of government" could and should be brief and comprehensive. A unicameral legislative body of few members, carefully chosen, with long terms, ample salary, in constant service, kept conscious of their duties with the possibility of recall, could from time to time promulgate laws so maturely considered and fitted to the requirements of the people that need would seldom if ever be felt for the statutory initiative or referendum. The writer ventures to hope that the coming New York constitutional convention will prepare and submit such a constitution.

At the recent meeting of the national bar association the startling statement was made that our Congress and state legislatures had passed 62,014 statutes during the five years from 1909 to 1913 inclusive. The crying need is for fewer and better laws. A state government might well consist of a board of governors not more numerous than the members of Congress from the state; it should be chosen in a manner to secure full and true representation of every considerable class of voters (proportional representation); this board of governors, being in constant service and possessing all the powers of government, would appoint only properly qualified men for administrative offices; it would promulgate laws only as they were needed, and these laws would be so carefully considered that they need not be numerous. With such perfect and efficient representation there would seldom if ever be occasion to use the initiative, referendum or recall.

(97)

ADDENDUM

In addition to the constitutional amendments submitted by legislatures for the election of November 3, 1914, reported above, the North Carolina legislature submitted ten amendments, and the legislature of Minnesota submitted eleven amendments. Some amendments were submitted by the legislature of Nevada, but we have not been able to ascertain the exact number yet. These additional facts emphasize the showing that it is the legislatures and not the initiative and referendum that induce whatever "electoral fatigue" the voters suffer from, which is complained of by ex-President Taft. The figures in this note will change the total of amendments submitted by legislatures given in the body of the above article.

THE PROBLEM OF ADEQUATE LEGISLATIVE POWERS UNDER STATE CONSTITUTIONS

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IN addition to the many specific questions that agitate a constitutional convention, there must always be in the background the general problem how to construct the entire framework of the instrument in such manner that it may best serve as the paramount law of the state. The situation confronting the convention in this respect may be briefly stated as follows.

State constitutions have grown vastly in bulk, and the increase is shared equally by the provisions relating to organization and those relating to governmental policy and action. With regard to the former it has been chiefly an elaboration of detail, with regard to the latter an enlargement by the introduction of new constitutional aims and functions. In the old constitution, stress was laid on governmental inaction; in the new it is on positive policies and measures.

Distrust of all public power was the keynote of the bill of rights; distrust of the legislature and dissatisfaction with its past performances the mainspring of many, if not most, of the subsequent limitations and prohibitions.

At the same time, in an increasing degree, the constitution was made the means of giving the most direct and forcible expression to the popular will. The desire to make a temporarily dominant policy secure against reversal by shifting political majorities was sometimes a factor in this development, but not the only one, for policies were expressed in constitutional clauses which had become fixed principles of legislation, removed from the strife of partisan politics, as the standing provisions relating to banks and railroads show. There was little danger that in these matters the legislature would thwart the will of the people, and as a matter of fact legislation readily

and effectually supported and carried out the constitutional policies.

In the course of time the habit of giving constitutional expression to the popular will produced inconveniences which could hardly have been foreseen at the beginning in their entirety. If the object of the constitution were merely to curb and check legislation, the piling-up of constitutional provisions would serve the purpose admirably. There are some purely prohibitive and negative clauses which thus fulfil their function and operate without trouble or difficulty.

It is otherwise where the constitutional provision is not self-executing. The clauses controlling legislative procedure require of course legislative application; so do all enabling and directing provisions; the articles organizing the departments of government are rarely complete without supplementary legislation; and even restrictive clauses are often only imperfectly effectual without administrative statutes to enforce them. It is often said that the modern constitution usurps the function of a statute; but the truth is that the most prolix constitution is, as a piece of legislation, fragmentary and dependent. No method has yet been discovered, or is likely to be discovered, which will make it possible to dispense with statutory legislation as the only adequate channel of expressing the popular will.

From this arises a new problem: the constitution requires statutory regulation; yet the constitutional status of the matter to be regulated withdraws it from the fulness of legislative power in respects unforeseeable by the most careful framer of the provision. Almost every word of the constitution, though it purport to be enabling, is apt to operate in some way as a limitation upon legislative action. The statute is subordinate to the constitution, and the courts annul the statute which is not in accord with the paramount law.

Constitutional supremacy is meant to be the domination of the legislature by the people; in effect it must mean the domination of the legislature by the courts. While it is true that the court applies only the checks which it finds in the constitution, it is also true that it is the court that finds the checks.

In making a constitution, the people, so far from speaking directly, interpose between themselves and their will two organs instead of one.

It must be doubted whether the situation is fully realized. The movement for the recall of judicial decisions is directed only against the possible misinterpretation of the most general clauses of the constitution, in applying which the judiciary is as likely to be the guardian of right and justice as to be the thwarter of the popular will. It does not touch the numerous cases in which the popular will is defeated by a strict construction of specific clauses. The bitter hostility with which the recall of decisions is opposed and the slight headway which the movement has made, also show that the people are reluctant to risk so radical and imperfectly thought out an experiment with a fundamental feature of our institutions.

Yet since a purely negative attitude toward a widespread political demand is generally futile, it behooves us to inquire whether the present relation between constitution and legislation is not capable of readjustment so as to remove conceded shortcomings and grievances.

What is needed is some *modus vivendi* between the various constitutional organs, a plan that will establish constitutional supremacy without defeating the popular will through constitutional technicalities, that will check the abuse and careless use of legislative power without destroying its fullest liberty for useful and adequate service, that will preserve the benefit of judicial control without reducing constitutional principles to the plane of statutory rules: that will, in other words, set the various organs free to perform their functions beneficially and not obstructively, and preserve the essence of constitutional checks without hampering the work of legislation by unessential and unintended accidents.

This result can be accomplished if a constitutional convention can be induced to do the following things:

1. Qualify or remove limitations that experience has proved to be of slight value or unenforceable.

2. Attempt to secure superior methods of preparing and enacting legislation.

3. Minimize the effect of limitations that are due to inadvertence and not to deliberate policy.

4. Emancipate the legislature from supposedly inherent restraints placed upon it by a judicial theory of the exclusiveness, the inalienability and the non-delegability of constitutional powers.

PROCESS OF LEGISLATION

1. *The Share of the Executive in Legislation*

It is one of the characteristic features of American legislation that the multiform structure of the legislature is in nowise utilized for functional differentiation. In most European systems the two chambers represent different political elements of the state, and the executive has practically the monopoly of initiating measures. The government is thus a petitioner, parliament a critic and the final judge. The reciprocal interaction of different organs of the body politic creates all around a hightened sense of responsibility for legislation.

There is no prospect of forcing by constitutional enactment a change of so delicate a nature as a transformation of the constitutional relations between the organs of legislation; such a change can be only a matter of slow and spontaneous growth. But it may not be impossible to invite reforms which look in the direction of a better utilization of the share of the executive in legislation, since his coöperation is already provided for, and the clear tendency of the time is to make him a more powerful factor in shaping both legislative policies and specific measures.

Three relatively simple changes are suggested for this purpose:

(1) Let the constitution give the governor the right to introduce bills. He can now readily find members to bring in bills known to emanate from him and spoken of as administration bills; they have been officially recognized as such by house rules;[1] but their status would gain if the governor could appear formally as their sponsor. The practice would not

[1] See as to Illinois a note in *American Political Science Review*, vol. vii, p. 239.

be revolutionary, since it is only a slight step beyond the existing power to recommend by message; and it would not be necessary to give governor's bills a preferred status. For a precedent reference may be made to the constitution of Alabama, which provides (art. 4 sec. 70) that the governor, auditor and attorney general shall before each regular session of the legislature prepare a general revenue bill, to be submitted to the legislature for its information, to be used or dealt with by the house of representatives as it may elect.

(2) In signing bills the governor frequently exercises a scrutiny of a technical character, discovering and pointing out legal and administrative defects. The merit of such criticism is rarely questioned. In some states the opportunity for it is unduly restrained by the short time allowed the governor for his action. What counts particularly is the time after adjournment, when the number of bills submitted simultaneously is greatest. In some states, however, he has thirty days, in others until the next meeting of the legislature, or practically unlimited time. These provisions ought to be made general.

(3) In close connection with the last suggestion, the constitution should facilitate a speedy method of accepting suggestions for amendment made by the governor. At present there is only the alternative of supporting the veto or overriding it, of passing an imperfect bill or dropping it and starting the process of enactment *de novo*. There should be a constitutional provision permitting the bill as amended in accordance with the governor's suggestions to be put to the vote of the houses. Such a provision exists in Alabama (art. v sec. 125), and also with regard to ordinances in Chicago (Act of 1905). A constitutional provision to this effect would probably encounter no opposition. It is almost a necessary counterpart to another provision sometimes advocated, which however has been adopted only in Washington, namely, that the governor may veto one particular section of a bill. The Alabama provision, indeed, makes the latter provision superfluous.

2. *Procedural Requirements*

Practically every constitution gives to each house the power to determine its own rules of proceeding. This autonomy is of course subject to specific constitutional requirements. The constitution of the older type is very sparing in imposing such requirements, taking over the few provisions of the federal constitution, which, being directory in their nature, cannot affect the validity of legislation. Nothing illustrates so strikingly the demoralization of American legislative bodies and the slight esteem in which they were held by the people, as the practice of transforming rules into constitutional restraints. A rule may be salutary as such, and vicious as an absolute requirement. If a body cannot be relied upon to frame proper rules or to respect them when adopted, there is something fundamentally wrong. The presumption is against the wisdom of the unyielding restraint or requirement. Constitutional conventions should therefore carefully revise these procedural provisions, which are too often adopted simply because they are found in other constitutions.

The following are the most common or the most conspicuous of the procedural requirements:

That bills shall be read three times; first found in North Carolina, 1776; qualified so that readings must be on separate days (first, South Carolina, 1780), or in addition so that reading shall be at large or at length (so in Illinois).

That bills shall be referred to committees and be reported by them. Note the particular requirements in Mississippi that committees shall report on sufficiency of title, or on the reasons for resorting to a special or local act instead of enacting general legislation.

That bills shall not be introduced after a stated period.

That rejected measures shall not be reintroduced at the same session; that a motion to reconsider shall not be entertained on the day of the passing of the motion.

That bills shall not be amended so as to alter the subject matter thereof.

That bills and all amendments shall be printed.

That bills shall be on the desks of members in their final form three days before their passage.

That the majority of all the members is required for the passage of a bill; that the vote must be by yeas and nays and entered on the journal.

That the signature of the presiding officer be affixed in open session under suspension of business.

Some of these provisions are salutary, and their fulfilment can be very readily verified, so particularly the one regarding the final vote. Others on the other hand are quite impracticable; *e. g.*, that a bill be read at large three times. In the case of long bills this must be ignored, and the clerk will simply read the first and last few words; and the necessary fraud will be covered up by a false entry on the journal. Some can be reduced to unmeaning and perfunctory forms, so that really nothing is gained by the requirement; *e. g.*, the Mississippi provisions above referred to, or the recitals indicating an emergency. Some give rise to difficult questions of construction; as, *e. g.*, whether an amendment alters the subject matter of the bill, or still more, whether it alters it substantially.

The sound policy of constitution making is to impose procedural requirements only under the following conditions: (1) that they serve an object of vital importance; (2) that they can be complied with without unduly impeding business; (3) that they are not susceptible of evasion by purely formal compliance or by false journal entries; (4) that they do not raise difficult questions of construction; (5) that the fact of compliance or non-compliance can be readily ascertained by an inspection of the journal. The application of these tests would lead to the discarding of most of the existing provisions, without any detriment to legislation, as is proved by the experience of the states which never adopted them. As to those retained, the judicial power to enforce compliance should be limited in accordance with the recommendations which will be set forth in connection with the provisions of the class next to be discussed.

3. *Formal or Style Requirements*

In addition to prescribing an enacting clause, the constitutions deal with title and unity of subject matter, and with amendatory acts, very exceptionally also with referential legislation. The provision concerning the title of acts is usually coupled with the other provision that the act shall not embrace more than one subject. The clause may be traced back to the instructions issued by the Lords of Trade to Governor Tryon on February 17, 1771, which said:

> You are also as much as possible to observe in the passing of all laws that whatever may be requisite upon each different matter be accordingly provided for by a different law without intermixing in one and the same act such things as have no proper relation to each other; and you are more specially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports, *etc.*

In the state constitutions the provision regarding title seems to appear first in the constitution of Georgia of 1798: "Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof" (art. 1 sec. 17). The conjunction of the requirement of title with that of unity of subject matter appears for the first time in the constitution of New Jersey of 1844 (iv, 7, 4): "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title." Such a provision is found now in about two-thirds of the state constitutions.

In Illinois in 1848 it was confined to special and local acts and in New York it is so restricted (private or local laws) at the present time. The provision was introduced in New York in 1846. The constitutional convention of 1867 made the provision general but the constitution proposed by it was rejected by the people. The constitutional commission in 1872 again proposed the extension of the provision to all acts, but the proposition was at that time stricken out by the legislature and no change has since been made in New York.

The provision forbidding amendments of statutes by mere reference to title, but requiring the section as amended to be reënacted, appears first about the middle of the nineteenth century. (Louisiana, 1845, seems to be the first.) In 1835 it is to be found in no constitution. It is at present to be found in about twenty state constitutions.

It was proposed for New York by the constitutional convention of 1867 but failed by the rejection of the proposed constitution by the people. The constitutional commission of New York of 1872 substituted for this provision another section to the effect that no act shall be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law or any part thereof shall be applicable except by inserting it in such act (art. iii sec. 16). A similar provision is found in New Jersey but in no other state. It appears from Lincoln's *Constitutional History of New York*, vol. ii, p. 494, that the section was agreed to by the constitutional commission of 1872 without a division and apparently without debate and that it was approved by the legislature and adopted with another amendment in 1874. The provision has remained without practical significance in New York, the court of appeals having sustained every law which was questioned on the ground of the violation of the section.

Literally construed, it is clear that the section would make all referential legislation impossible. This could not have been the intent of the framers, and we are left to guess what they did mean. There is hardly a provision to be found in any American state constitution which so strikingly illustrates the thoughtlessness with which clauses are adopted, and, once adopted, are perpetuated in successive constitutions.

The requirements regarding title and subject matter undoubtedly inculcate a sound legislative practice, and in the great majority of cases amendment by reënacting a section is preferable to amending words or passages torn from their context. If the requirement to amend in the form of reënacting sections were generally construed, as it has been in Illinois and Nebraska, as forbidding or throwing doubt on supplemental acts

altering the effect of existing sections, its inconvenience would be much greater than its benefit; but the Illinois and Nebraska decisions are anomalous and indefensible.[1]

Conceding that these style requirements have had on the whole a beneficial effect upon legislative practice and the clearness of statutes, they have a reverse side which must not be ignored. They have given rise to an enormous amount of litigation, they have led to the nullification of beneficial statutes, they embarrass draftsmen, and through an excess of caution they induce undesirable practices especially in the prolixity of titles, the latter again multiplying the risks of defect. While the courts lean to a liberal construction, they have in a minority of cases been indefensibly and even preposterously technical, and it is that minority which produces doubt, litigation, and undesirable cumbrousness to avoid doubt and litigation.

The requirements were introduced to protect legislatures from fraud or surprise, and to stop the practice of log-rolling. The experience of those states which have not adopted the provisions would probably show that they are less necessary now than seventy-five years ago, that better practices have been compelled by public opinion, and that the benefits of the improvement may be enjoyed without the attendant risks and evils. Whether these considerations are sufficient to induce a constitutional convention to discard the provisions, is another question.

If, however, these provisions are retained, another reform is suggested, which should also be applied to all procedural requirements concerning legislation. The suggestion is that the validity of a statute shall not be allowed to be be questioned by reason of the alleged violation of any of these provisions in any action commenced later than a brief stated period either after the expiration of the session of the legislature or after the act has taken affect. Since an ordinary legitimate cause of action may not arise within the prescribed period, the pro-

[1] See an article on Supplemental Acts by the present writer, in *Illinois Law Review*, v. viii, p. 507.

vision might well be accompanied by another provision to the effect that such a statute may be impeached in a direct proceeding brought for that purpose by any citizen or any other party affected by the act (conceivably not a citizen), the attorney general being notified and having a right to intervene. The permission of a direct proceeding would merely regularize the rapidly growing practice of instituting suits for *quo warranto* or injunction against officials charged with administering an act, for the mere purpose of testing its validity.

Even more beneficial might be a provision to the effect that no statute should be questioned in any event by reason of the alleged violation in specific respects of a formal requirement where prior to its approval the attorney general had given his written opinion to the effect that its form or the procedure of its enactment did not in those specific respects violate the constitutional requirements.

The dangers against which the constitution desires to guard in formal and procedural requirements are necessarily of a transitory or ephemeral nature, which by the lapse of time become substanceless. If interests are prejudiced by precipitate haste, surprise, or log-rolling, a reasonable chance is given them to attack the law. After that chance has been given and no one has availed himself of it, the violated constitutional provision becomes merely a technical loophole of escape from the law, and the constitution makes it possible, not to protect legitimate interests, but to defeat the legislative will.

Constitutional Provisions to Improve the Quality of Legislation

Several readings, reference to committees and requirement of committee reports, concurrence of another house and executive approval,—all these are intended to make for more careful deliberation; all style requirements make for greater perspicuity and for better information of legislators; the provisions for the final vote for greater responsibility of the individual legislator. All these may be presumed to have had some effect and yet the technical quality of our legislation is inferior to that of Great Britain or Germany, in which no similar constitutional rules exist. Thus very forcibly the fact

is brought home to our minds that the effect of mechanical devices is limited and that it is a mistake to multiply mandatory rules to bring about what can be achieved only by sound tradition and by voluntarily accepted restraint and influence.

Clearly the organic nature of a large and distinctly political body is not conducive to high standards of workmanship. Sound and careful legislation is professional work, and diffused responsibility, a main characteristic of American legislatures, prevents criticism without which professional excellence is impossible. If European statutes are better made, it is because they emanate from the administration, and it is a well-known fact that in America statutes prepared by commissions are superior in form to those introduced from the body of the legislature.

In a few states the need of professional assistance has long been recognized, and in a rapidly increasing number of states provision has been or is being made for the organization of a drafting service in connection with legislative reference bureaus. So far as can be done without unduly hampering the freedom of legislative action, the constitution should strengthen this movement and should afford every facility for technical aid and intelligent criticism.

(1) If a drafting service is to be successful, a staff of expert men must be trained for the work. This means security of tenure in the service. Under our present constitutions it is impossible to give such tenure. The drafting officials should be part of the legislative staff, in order to win the full confidence of the houses; so long, however, as each house of the legislature has the constitutional right to choose its own officers, no statute can impair the right of each new house to make new selections.

The constitution should therefore provide that the right to choose officers shall be subject to any legislation enacted to regulate legislative official and clerical services. In no other way can civil service principles be made applicable to the staff of the legislature. (The value of such a provision would of course extend far beyond the improvement of the quality of the drafting service).

(2) While it may be unwise to attempt to curtail freedom of action in the interest of a more perfect legislative product, the constitution might well at least secure opportunity for expert information and criticism. This purpose would be accomplished by a provision to the effect that on the demand of the governor or of the presiding officer of either house, or of a stated proportion of members, a bill shall be referred for opinion and suggestion to any designated official bureau or commission; upon its being so referred action to be postponed for not exceeding a specified period; the legislature to be free to accept or reject any suggested alteration. The members would thus be in a position to judge between the merits of two alternative propositions, one of which would represent the best readily available expert knowledge. If the period fixed for the delay is reasonably brief, the danger that demands for reference may be made for the mere purpose of hindering action, would not be serious; emergencies would have to be provided for, but only under effective safeguards; as, *e. g.*, a special message of the governor, declaring the urgent necessity for the immediate passage of the bill.

RESULTING LIMITATIONS

Resulting limitations are the consequence of positive constitutional provisions not intended primarily as restraints or checks upon legislation, provisions sometimes imperfectly operative without further legislation, and sometimes even enabling and directory in their character. They should be distinguished from other unexpressed limitations which are regarded as inherent in the nature of some constitutional power.

To illustrate: If the constitution says the Supreme Court shall have original jurisdiction in certain classes of cases, and it is inferred that the legislature can confer no additional original jurisdiction, this is a resulting limitation. If it is held that the power of taxation can be exercised only for public purposes, that is an inherent limitation. A resulting limitation is a matter of constitutional construction, an inherent limitation a matter of constitutional theory.

Very often the doctrine of resulting limitations means that

an implied power is treated as independent and exclusive, curtailing, if the implied power is executive or judicial, the normal functions of the legislature. Whether the implied power carries with it necessarily a resulting limitation is an open question. The first Congress in organizing the Department of State rejected a provision making the Secretary in terms removable by the President, preferring to treat the executive power of removal as an implied power. In 1867, Congress, in passing the Tenure of Office Acts, treated this implied power as one subject to legislation. These acts were subsquently repealed, and their validity has never been passed upon by the Supreme Court, but there is quite recent legislation making officials removable for specified causes only.[1] If this legislation is valid, it illustrates the existence of an implied power without a resulting limitation.

The doctrine of resulting limitations is co-equal with the final establishment of the judicial power to declare laws unconstitutional, for it was applied in Marbury *v.* Madison (1 Cranch 137, 1803), to a statute undertaking to vest the Supreme Court with original jurisdiction other than that specified in the constitution. While the decision itself has never been questioned, it is a fact of some significance that its entire reasoning has been calmly ignored in dealing with the converse proposition of vesting in inferior courts concurrent original jurisdiction over matters assigned by the constitution to the Supreme Court.[2] Chief Justice Marshall certainly regarded both propositions in the same light, for he distinctly stated (p. 174) that Congress could not give the Supreme Court appellate jurisdiction where the constitution had declared that its jurisdiction shall be original. It should also be borne in mind that the legislation declared unconstitutional was framed and enacted by a Congress as thoroughly familiar with the spirit and intent of the constitution as the judges of the Supreme Court, and no doubt occurred to them concerning its validity.

[1] See Shurtleff *v.* U. S., 189 U. S. 311, and the subsequent Tariff Acts of 1909 and 1913 as to tenure of general appraisers.

[2] Willoughby, *Constitutional Law*, § 1557.

The difficulties in dealing with the question of resulting limitations are well illustrated by a recent decision of the supreme court of Illinois (People *ex rel.* Gullett *v.* McCullough, 254 Ill. 1, 1912). A civil service act of the usual type was enacted in 1911, to apply to the subordinate places in the various departments of the state government. The validity of the law was contested by several clerks in the office of the secretary of state assigned to the performance of statutory functions. The contention was that since the secretary of state was a constitutional officer, his power to appoint necessary subordinates could not be controlled by legislation otherwise than through the constitutional power of appropriating necessary funds. The court by a bare majority decided the case against the contestants. The principal opinion took the ground that the fact that an office was constitutional did not destroy the general legislative power to regulate the details of its organization and the tenure of the subordinate officials. One judge specially concurred on the ground that the particular duties assigned to the officials who attacked the statute were statutory, but conceded that the secretary of state cannot be controlled by legislation in the appointment of subordinates whom he needs to perform functions which belong to the ordinary province of a secretary of state. The dissenting judges denied, *in toto,* the power of the legislature to regulate the appointment of subordinates of a constitutional officer. The opinions rendered thus represent the three attitudes toward the problem of resulting limitations: the view in favor of a full legislative power of regulation in matters not expressly regulated by the constitution; the opposite view that constitutional status excludes legislative regulation; and the middle view that constitutional recognition implies at least some degree of independence as against the legislature; which must be determined from case to case.

Only a minority of the supreme court of Illinois in the case referred to take the first view, recognizing a general legislative power to place a constitutional office under civil service rules, where the constitution is silent as to the organization of the office beyond a bare mention of it. It would be difficult

to say which of the three views represents the prevailing American doctrine. Generally speaking, however, the question is sufficiently close to furnish a ready pretext for the refusal to enact such legislation on the plea of lack of constitutional power.

The lack of legislative power would be almost uncontroverted, if the constitution gave the constitutional officer the power in terms to appoint his subordinates, as was the case in New York with regard to the superintendent of public works. In that case the court of appeals of New York was unanimous against the applicability of the civil service law (People *v.* Angle, 109 N. Y. 564), and an amendment of the constitution was necessary to make civil service rules applicable to that branch of the service.

An analysis made about ten years ago of statutes declared unconstitutional in a number of leading states showed that these resulting limitations furnished the ground of invalidity in about twenty per cent of the cases. While in itself the proportion may not seem excessive, it is all too large when it is considered that no valuable principle is generally involved in this class of cases. When constitutional questions turn on fundamental rights or policies, the judicial decision may not command universal approval, but there is at least the assurance that the statute appeared in the court in some essential respect objectionable. The resulting limitation on the other hand is generally a purely technical one, not within the contemplation of the framers of the constitution; more often than otherwise the result of an accidental turn of phrase, or due to the impracticability of properly qualifying the rules laid down in such a compendious document as the constitution.

In some cases, it is true, the resulting limitation represents what to the court appears to be an essential principle: the saving of executive or judicial independence from meddlesome and abusive legislation. Cases involving the contempt jurisdiction of courts furnish a striking illustration in point.[1]

[1] See also legislation regarding admission of attorneys to practice: *ex parte* Day, 181 Ill. 73.

When the practice of special legislation was common and the principle of equality less developed than at present, the apprehension of legislative intermeddling may have had some foundation in political tendencies or possibilities. To-day, when the danger of legislative impairment of the legitimate province of either judicial or executive action is extremely remote, it should be considered whether the doctrine of resulting limitations does not in its turn impair the legitimate province of legislation.

It certainly has this unfortunate consequence: Neither the executive nor the judiciary have any constitutional rule-making organs. The executive may formulate a rule for his action, but it is not binding on his successor nor even upon himself. If a court has inherent power to determine the qualification of attorneys and the supreme court is not vested with a constitutional power of superintendence over all other courts, what legal guaranty is there for uniformity of rule or policy in this respect either between supreme court and inferior courts, or even between the various courts of original jurisdiction, each of which has equal constitutional jurisdiction? If a reform is desirable in contempt procedure, how can it be brought about? The exercise even of constitutional powers ought to be subject to law—that is to say, uniform and orderly; but the constitution knows no law-making organ except itself and the legislature. Deny the validity of legislative regulation on the ground of the constitutional status of a function or power, and you proclaim that that function is amenable to no law except the voluntary restraint of the official who exercises it; the doctrine of resulting limitations becomes a doctrine of constitutional anarchy. Who, in view of this doctrine, can tell with certainty, whether or to what extent the administration of martial law, where it is claimed directly under the constitution, is a legitimate subject of legislation? If it is not, do we not recognize as exempt from legislation a dangerous power which can be and is regulated by statute in countries supposed to have less civil liberty than we have? Must this not create a sense of legal insecurity totally at variance with the spirit of constitutional government? It be-

hooves us at least to realize the far-reaching and alarming consequences of the doctrine of resulting limitations.

What is needed to deal effectually with the inconveniences of this doctrine of resulting limitations, is a new canon of construction. Would it be wise to formulate such a canon by constitutional enactment? There are plausible objections. Constitutions have not in the past attempted to control the judiciary in this respect, and the undertaking is one of considerable delicacy. On the other hand, the very difficulty of forcing the hand of the courts is a strong point in favor of the proposition. No mandatory formula could be devised which would permanently subjugate the essential freedom of judicial construction; the purpose and function of any constitutional canon of construction would merely be to enable the courts to break away from doctrines to which they consider themselves, perhaps reluctantly, bound by established precedents.

A similar problem has arisen in connection with statutory rules of practice and procedure which courts felt bound, by precedent, or by the supposed limitations of judicial power, to apply in a literal and technical spirit. To meet this difficulty, the New Jersey Practice Act of 1912 provides as follows:

> These rules shall be considered as general rules for the government of the courts and the conducting of causes and as the design of them is to facilitate business and advance justice they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

If such a provision is deemed appropriate with regard to a statutory code it would seem that a similar rule, much more conservatively framed, might be advantageously applied to a constitution which cannot speak with the particularity of a statute, and which is so much more difficult of amendment. In New Jersey the legislature set the judiciary free by declaring that the letter should not kill the spirit; a similar declaration on the part of the constitution-making power would set free not merely the judiciary but also the legislature.

The legitimate claims of legislative power have been unduly curtailed in two ways: by excessive implication of coördinate, independent and exclusive power in other departments, and by insufficient implication of legislative power by way of reasonable allowances tempering unintended consequences of the strict letter of the constitution. It should therefore be expressly recognized that presumably the constitution is intended to take care only of essentials, and that, subject to the effectual guarding of those essentials, the needs of government demand the fullest power of subsidiary regulation through statutory enactment.

To illustrate: If the constitution fixes the term of office, this should not necessarily exclude legislation for holding over (as expressly permitted by the Rhode Island constitution of 1842, art. 4, § 16), or for changing the time of election;[1] provided the change of time is not merely a contrivance for extending the term; nor should the extension of a term for the purpose of preventing a vacancy be regarded as a legislative appointment to office; nor should a constitutional appointing power be deemed inconsistent with legislation prescribing qualifications for eligibility to appointment. The executive power to execute the laws should not prevent legislative regulation of martial law. The vesting of jurisdiction in certain courts should not prevent the fullest legislative power to regulate procedure; even the power to punish for contempt should not be withdrawn entirely from legislative regulation. It is unnecessary further to multiply instances.

The phrasing of an appropriate canon of construction by the constitution is a matter of great difficulty, and there is perhaps no available formula to which exception cannot be taken in some respect. The main hope for an agreement must be found in the fact that, as pointed out before, the operation of any canon of construction will of necessity be enabling rather than mandatory, that courts will not be absolutely bound, but merely aided in adopting more liberal views of legislative power.

[1] See 163 Ind. 150; 71 N. E. 478; 177 Ind. 564; 98 N. E. 342, 1912.

The following is tentatively suggested as a possible clause:

> The provisions of this constitution express fundamental principles and policies and shall be construed accordingly. The legislature may regulate the exercise of constitutional powers for the better carrying out of their purposes, and may, without violating the spirit of a provision, apply it with the necessary qualifications demanded by the practical requirements of government. Constitutional powers shall be exercised in subordination to the principles which they are intended to serve.

Resulting limitations can also be eliminated to a considerable extent by making constitutional provisions expressly subject to change by statute. Provisions to that effect now occur, either so that after a specified time the legislature may act,[1] or so that the constitutional provision is operative only until or in the absence of legislative action.[2] This practice is of course capable of indefinite extension, and may be used as a compromise in dealing with the tendency to overload unduly the constitution with detailed provisions. However, it would be impossible to differentiate on principle clauses that should or might be made amenable in this way; still less, of course, to formulate in abstract terms a classification of clauses for this purpose. If the expedient is to be resorted to, it will be necessary to consider carefully in detail to what provisions it is to be made applicable.

INHERENT LIMITATIONS

The inherent limitation is supposed to flow from the nature of the power itself. It is not expressed in the constitution; it is not imposed by the claims of coördinate powers, nor does it result from the operation of specific constitutional provisions; but it either indicates the bounds of state sovereignty, or expresses the essential integrity of legislative power as against impairment by the legislature itself. In the latter aspect, the inherent limitation practically means that beyond a certain

[1] See, *e. g.*, corporation article in the constitution of Oklahoma.

[2] See United States constitution, time of meeting of Congress.

point the legislature cannot surrender its power or bind its future action. Such inalienable freedom does not necessarily make for increased capacity, just as an infant who cannot legally bind himself finds himself unable to do business.

The problem of inherent limitations has in recent times been most discussed perhaps in connection with the delegation of powers of regulation to administrative authorities. The present tendency is to recognize the validity of such delegation to a very considerable extent. To what extent the legislature may or should justly go, is a question that only experience can solve. Expressly to sanction a power of delegation by constitutional provision without qualification, might throw open the doors too wide; to prescribe in detail modalities for the exercise of delegated power, might hamper unduly future developments. In view of the liberal attitude of the courts, no express recognition of the power seems to be called for, and on the whole it may be wiser to omit an express provision.

However, express provisions seem desirable to relax supposed inherent limitations in the following respects:

1. For the purpose of allowing a state-wide referendum.

2. For the purpose of better guarding the exercise of the police power.

3. For the purpose of securing greater uniformity of legislation within the state.

4. For the purpose of facilitating uniform action between the states.

1. *The State-wide Referendum*

There is judicial authority to the effect that the legislature may not make the taking effect of an act of state-wide operation to depend upon the result of a popular vote.[1] There are weighty reasons why the legislature should not lightly pass the responsibility for its measures on to the electorate, but there are also considerations on the other side. The constitution might permit the referendum by the legislature at least in certain cases or under certain conditions.

[1] Barto *v.* Himrod, 8 N. Y. 483.

It might also be worth while to consider whether, as a substitute for the initiative (or in addition thereto), the constitution should not permit a referendum to the people of a measure introduced by the governor or passed by one or both houses, and which has failed to become a law, upon the motion either of the governor or of one or both of the houses. In this way every measure having a respectable popular support would have a chance of being submitted to the people, with more responsible endorsement and after more consideration than initiative propositions often have.

2. *Action under the Police Power*

The prevailing doctrine is that no action of the legislature can bind the future exercise of the police power. It may be conceded that the power to protect health, safety or morals must not be bargained away; yet the doctrine has been carried to excess, and interests acquired in reliance upon the faith of legislative declarations have been allowed to be disappointed and sacrificed. It is not merely a question of the sound constitutional theory of vested rights, but a matter of wisdom and policy, that it should be possible in enacting legislation to give some assurance that people may act upon it with safety. There would probably be no disposition—desirable though it might be—to allow legislation to be enacted with a provision that for a limited number of years it shall not be altered to the detriment of vested interests, except under urgent requirements of safety. Less objection might however be felt to a constitutional provision permitting a legislative provision that if valuable rights or privileges are taken away in the exercise of inalienable legislative power, the question of compensation on equitable principles shall be referred to judicial or arbitral authority.

3. *Provision for Unity of Statute Law*

The practice of legislation might be considerably harmonized, and its quality improved incidentally, by the enactment of general statutes (comparable to the English "clauses acts") dealing exclusively with subsidiary matters of administration,

enforcement, operation or interpretation, which are now taken care of as part of each particular piece of legislation, these statutes to be incorporated by reference into any legislation to which they may be applicable. In this way alone uniform administrative principles can be secured.

Even after the enactment of such statutes it may happen that in preparing some particular bill provisions of the same subsidiary character are inserted, in disregard of the general act. If there is an express purpose to override the general provision, the legislative intent should of course prevail; often, however, it is as a case of mere inattention or ignorance of the fact that the matter is already provided for. If so, there results a needless and inadvertent diversity of laws where uniformity would be more in accord with good legislative policy or even with constitutional principles.

This situation might be remedied by a constitutional provision establishing as a rule of construction that if an act to which general statutory rules of an administrative or otherwise subsidiary character would in the absence of express provision be applicable contains special provisions which are susceptible of a construction at variance with those general rules, the special provisions shall in the absence of clear intent to the contrary be construed as subordinate to the general rule, or as directory so that the general rule may prevail.

4. *Provision for Interstate Uniformity*

Two ways are at present open to secure uniform legislation between several states: an act of Congress, and concurrent state legislation. The scope of congressional legislation is limited by the federal constitution, which is difficult to amend, and which lacks a provision similar to that found in the Australian constitution, permitting the common regulation by the national legislature for a number of states of any matter referred to it by these states. Concurrent action between the states is a slow and unsatisfactory process without any guaranties of permanence.

A state constitution could, however, aid concurrent action in at least two respects:

a. Legislative agreement. The federal constitution forbids the states to enter into agreements with each other without the consent of Congress. It follows from this that such agreements are possible provided the consent of Congress be obtained. Congress may probably give its consent in advance to specified kinds of agreements. At least this was done by act of March 1, 1911, whereby consent was given to any compact which states might enter into for the purpose of conserving forests and water supply. Why then should not several states make agreements for identical legislation? Because, it seems, the federal constitution presupposes some competent state authority to make the agreement, and does not undertake to create such authority. The contractual capacity of a state is vested in the legislature, but is undoubtedly limited to matters as to which a state under its constitution may bind itself by agreement. The legislative policy of the state does not belong to this class. There is at present no way by which a state can by agreement with another state bind itself to a certain course of legislation, or make a statute, adopted by agreement with another state, irrevocable. There is no reason, however, why this should not be possible under express constitutional authority. A constitutional provision authorizing agreements concerning legislation is therefore desirable. The power would have to be restricted in various particulars, especially as to time limits for such agreements, but the principle of the power is unobjectionable, and should at least be presented to a constitutional convention for consideration.

b. Joint commissions. The cause of uniform legislation would be greatly strengthened by the creation of offices or commissions common to a number of states, charged with the task of establishing technical or scientific standards for matters subject to statutory regulation. To a constantly growing extent modern legislation is concerned with matters in which effectual rules must be based upon conclusions reached after expert inquiry. A common bureau for the prosecution of such inquiries would have the advantage of a wider range of selection of competent men; its findings would be more reliable; there would be a saving of time and money; and uniformity of provisions would be brought about without special agreement.

There might, however, be a constitutional difficulty in making such conclusions available for state legislation. Conceding that powers of regulation may be delegated to commissions, may they be delegated to commissions not belonging exclusively to the state? Or to put it in another form, is it a proper exercise of administrative discretion to defer to the conclusions of persons not responsible to the state? It is to say the least uncertain how these questions would be answered.

The uncertainty can be removed by a simple enabling provision authorizing the legislature to join with other states in the creation of joint bureaus or commissions for the working out of technical standards, the standards thus worked out to be available as norms to be applied in the administration of state statutes, though subject to state control and alteration. A provision of this kind would perhaps have the incidental effect of encouraging the establishment of these agencies of uniformity.

5. *The Due-Process Clause*

It may be asked: if legislative powers are to be enlarged, why not also attempt to deal with the limitations that have arisen from a supposedly illiberal application of the guaranty of due process? A moment's reflection will show that we are here confronted with a totally different problem. The interpretation of the due-process clause involves the entire concept of the state and of state power; any attempt to control it by a comprehensive constitutional provision, short of entirely altering the scope of judicial power, must fail. In this matter enduring change is possible only by altered judicial views and convictions, although particular matters may perhaps be dealt with by specific enabling provisions, as in New York in the matter of workmen's compensation. The question here is not between strict and liberal, but between right and wrong construction. It would be impossible to find a formula adequate to the solution of the problem.

The suggestions made in this paper claim the merit of avoiding highly controversial ground, and of paving the way for great and needed reforms without destroying the benefits of judicial control.

SUMMARY

1. In addition to the specific questions to be dealt with by a constitutional convention, there is the general problem of molding the entire framework of the constitution in such a way as to make it most serviceable as the paramount law of the state.

2. In all states there has been a great increase in the number of provisions which are not fully operative without statutory legislation.

3. Every provision of the constitution, though intended to be enabling, operates to some extent as a limitation, enforced by the courts.

4. In so far as this is true, the people in making a constitution, instead of speaking directly, interpose between themselves and their will two organs instead of one.

5. The remedy lies in devising a structure of the constitution that will preserve the benefits of judicial control without hampering the work of legislation by unessential or unintended limitations.

6. For this purpose it will be necessary:

(a) To remove or qualify limitations that experience has proved to be of slight value or unenforceable.

(b) To attempt to secure superior methods of preparing and enacting legislation.

(c) To minimize the effect of limitations that are due to inadvertence and not to deliberate policy.

(d) To emancipate the legislature from supposedly inherent restraints placed upon it by a judicial theory of the exclusiveness, the inalienability and the non-delegability of constitutional powers.

7. The process of enacting laws should be improved by affording added facilities for executive aid in legislation, and by revising the present procedural requirements.

8. The chief organic defect of American methods of legislation is that the multiform structure of the legislature is not utilized for functional differentiation. While a change in that direction cannot be forced, the following measures would enlarge the share of the executive:

(a) A right to introduce bills, as now recognized with regard to general revenue bills in Alabama.

(b) An enlargement of the time for executive approval in order to afford better opportunity for the scrutiny of bills.

(c) A right of the governor to present with his veto amendments that may be voted on at once, likewise recognized in Alabama.

9. Procedural requirements should be revised for the purpose of making sure:

(a) That they serve an object of vital importance.

(b) That they do not unduly impede business.

(c) That they are not susceptible of evasion by purely formal compliance or by false journal entries.

(d) That they do not raise difficult questions of construction.

(e) That the fact of compliance or non-compliance can be readily ascertained by an inspection of the journal.

10. Requirements regarding form and style of bills (title, unity of subject matter, amendatory acts) have on the whole tended to eliminate undesirable practices in legislation; but this benefit has been largely offset by the large number of constitutional questions they have raised and by the needless prolixities which are induced by the fear of violating the requirement, if not by the requirement itself.

11. The benefits of both procedural and form requirements can be retained and their inconveniences minimized by forbidding the validity of statutes to be questioned by reason of the violation of either, after the expiration of a brief period to be fixed by the constitution. Any harm caused by the violation of these requirements is speedily cured by lapse of time.

12. In order to improve the quality of legislation the constitution should encourage expert coöperation in the drafting of statutes. With that end in view:

(a) It should be made possible to place drafting clerks under civil service rules; under present constitutions legislative employes cannot be brought under these rules.

(b) The right should be given to the governor or a stated proportion of the members of either house, to demand the suspension for a brief period of the proceedings on a bill in order

to obtain the opinion of officials familiar with the subject matter; the legislature to be free to act upon the opinion or not.

13. Powers of legislation are unduly curtailed by the doctrine of resulting limitations which operates either by giving literal effect to constitutional provisions expressed without sufficient allowance for necessary detail or qualification, or by treating executive or judicial powers as exclusive and independent of legislation. In either case salutary legislation may be rendered impossible, and in the latter case the power is amenable to no rule whatever, since neither the executive nor the judiciary has any inherent rule-making authority.

14. This situation may be remedied by formulating in the constitution a new canon of construction, which without attempting rigidly to bind the courts would enable them to adopt more liberal views of legislative power. The provision might perhaps be worded as follows:

> The provisions of this constitution express fundamental principles and policies and shall be construed accordingly. The legislature may regulate the exercise of constitutional powers for the better carrying out of their purposes, and may, without violating the spirit of a provision, apply it with the necessary qualifications demanded by the practical requirements of government. Constitutional powers shall be exercised in subordination to the principles which they are intended to serve.

15. Resulting limitations may also be diminished by making specified constitutional provisions expressly subject to change by statute.

16. The legislative power is further curtailed upon the plea of preserving it unimpaired and in full integrity. Beyond a certain point the legislature cannot surrender its power or bind its future action. An inalienable freedom in effect amounts to a reduction of disposing capacity.

17. The present tendency of the courts is to be liberal in allowing delegation of powers or regulation to administrative authorities. An express constitutional sanction of this power of delegation seems unnecessary, and it would be difficult at the present time to forecast possibly desirable qualifications.

18. Express constitutional provisions would be appropriate to relax supposed inherent limitations in the following respects:

(a) To allow a state-wide referendum.

(b) To guard better the exercise of the police power.

(c) To secure greater uniformity of legislation within the state.

(d) To facilitate uniform action between the states.

19. The power of the legislature to make the effect of a statute depend upon approval by popular vote being controverted, the constitution should permit the practice at least under specified conditions. Perhaps the power should also be vested in the governor or in either of the houses to demand a referendum on bills which have failed to become law in the regular course of legislation. The latter provision might prove acceptable as a substitute for the initiative.

20. A constitutional provision is needed and desirable to make it possible for the legislature in enacting police legislation to guarantee that if valuable rights or privileges are taken away in the exercise of inalienable legislative power, the question of compensation on equitable principles shall be referred to judicial or arbitral authority.

21. In order to harmonize the administration and enforcement of statutes, the usual clauses which are needed to make a statute operative should be consolidated or codified. To make these codes fully effectual, they should have appropriate constitutional recognition.

22. To promote uniformity of legislation between the states, the constitution should sanction concurrent legislation by way of agreement, subject to the approval of Congress.

23. For the same purpose the constitution should authorize appropriate legislation for the creation of joint bureaus or commissions to work out common standards for the states represented, to be applied to the administration of state statutes, subject to legislative control.

24. No attempt should be made to control by a comprehensive constitutional provision the application of the guaranty of due process of law.

PARTICIPATION OF THE EXECUTIVE IN LEGISLATION [1]

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THE impression seems generally to prevail that during the last generation representative assemblies have declined in popular regard, and that the high confidence once reposed in them has given way to doubt and disillusionment. This change may be observed in France; it may be observed to some extent in England; but nowhere else has the legislature sunk so low in public esteem as in our American states. Contempt is expressed openly in the newspapers and reflected in the endless limitations upon legislative power which the constitutions impose. As each session ends, a universal sigh of relief shakes the atmosphere, and men go about estimating the extent of the damage.

No such phenomena are to be observed across the border, in the Canadian provinces. Criticism there may be, but no contempt. Why should the legislature be still respected in Ontario (let us say) and regarded with profound distrust in New York? In part, no doubt, the ballot explains the difference. In Canada, with a short ballot, the elector knows the candidates and votes effectively; in New York, on November 3, when both houses of the legislature were chosen, thirty-three other offices had to be filled in some districts. But another explanation seems to me quite as fundamental. In Ontario, as in England or France or Italy, the executive has assumed a position of recognized leadership and responsibility in the legislature. The prime minister, during his term of office, occupies a place of power tempered only by searching criticism and complete publicity. And when election-time comes, the people inquire: "What were the pledges which this man

[1] Read at the meeting of the Academy of Political Science, November 19, 1914.

made when we chose him to lead us? How faithfully has he discharged the trust?" If they are satisfied, they keep him in his place; they may keep him there for ten or twenty years; and as long as he is there the legislature must obey him.

Here in our states, though only in a half-conscious, tentative fashion, the advantages of executive leadership are coming to be recognized. Has not the governor been elevated into a kind of tribune of the people? Is it not tolerably well understood that, while our legislators, bound to the service of their little districts, do not lead or represent the people of the state, the governor does—just as the prime minister does—and that through him the people must find a way to control and formulate public policy? But though much is expected of the governor in the way of performance, relatively little has been done to strengthen his legal position. His power has developed mainly with the accumulation of precedent and the growth of custom. He must proceed to his task satisfied that moral support will be forthcoming from the people of the state and yet forced to rely on indirect and half-questionable methods to gain his ends. If we concede to the governor the message and the veto, if we thus recognize him as an integral part of the legislature, why should we make the exercise of his legislative functions so difficult and uncertain? The message, implying the right of initiative, and the veto, implying the right of amendment, must be reinforced with further specific authority if the actual power of the governor is to correspond with the power which the people evidently expect him to wield. Is it fair to demand leadership and then refuse the means of persuasion or compulsion which are necessary to its effective exercise?

What practical and immediate changes might be made in existing practice without the danger of dislocating governmental machinery or incurring the charge of leze majesty?

First as to the message. Would it not receive new force and dignity if delivered orally before both houses in joint session? Would it not make a stronger impression both upon the legislature and upon the constituencies outside? The experience of President Wilson and Governor La Follette indi-

cates that it would. This practice might very properly be regulated by the constitution.

The message is only a general statement of what the executive proposes. The details have still to be worked out. If left to its own devices, the legislature may, through lack of information and through lack of prolonged consideration, devise an inadequate bill; or it may, with the intention of throwing discredit on the proposal, embody in the bill objectionable features. The message, therefore, should be followed by the submission of bills drafted by the governor and heads of departments (who should be his appointees, of course) with or without assistance from members of the legislature. It is true that under present conditions administration bills are occasionally submitted and that the practice is becoming more frequent. But until the practice is applied in every case, and with public knowledge, responsibility as between the governor and the legislature will be difficult to place.

This initiative of the governor should be exclusive as to some matters and concurrent as to others. He alone should frame money bills; and the legislature, while free to reduce the proposed grants, should not be permitted to increase them or to alter their destination. This is the system which prevails in England and in the self-governing colonies, and which has proved such an effective check upon log-rolling and extravagance. It is substantially the system which prevails in New York city. Under such an arrangement the legislature still retains the power of the purse, the right to refuse supply, and is at the same time saved from its besetting weakness. No other way has been found to prevent raids upon the treasury or definitely to fix responsibility for expenditures.

In other matters the initiative may well rest equally with the governor and the legislature. But there are obvious reasons why the administration measures should have precedence over all other business in both houses. This is no new suggestion. It was advocated by Governor O'Neal, of Alabama, and others at the conference of governors last year. It has been adopted as a rule of the Illinois house of representatives. Under that rule an administration measure may be

sent to the appropriate committee or, on the request of the introducer (who may have reason to distrust the committee), to the committee of the whole house; and, when reported, the bill has precedence over all other business except supply.

But a concurrent initiative, even coupled with a right to prior consideration, would not strengthen the hands of the governor sufficiently. The committees may refuse to report his bills, or the legislature may incontinently reject them. It happened so in Illinois. What then? Of course the governor is at liberty to spread his gospel from end to end of the state if he can. But though he may convert a good many people, he may fail to convert the legislature—as Governor Hughes found in the case of his direct-primary bill. Could not the matter be settled by a popular vote? It has been suggested that, in case of deadlock, a referendum might be had upon the governor's proposal.

The referendum clearly affords a possible solution. In the western states it is considered as something in the nature of a universal remedy. And what more natural than to have the governor and legislature submit their differences to arbitration by the common source of their authority? But there are objections to the referendum. First of all, it places a further burden upon an already overburdened electorate and adds a further complication to our already complicated political machinery. Moreover, the issue would be laid before the people, as Mr. Stimson has remarked, without the face-to-face debate, the cross-examination, the asking of awkward questions which would be possible if the governor and his cabinet were admitted to the floor of both houses. The governor, taking advantage of his position as popular leader, might assail the obstructionists; and they might answer, not openly, but by means which experienced politicians know how to employ. And finally, while the particular subject of disagreement might be settled, the referendum would have had no direct influence in correcting the evils which have gone so far in discrediting the legislature. By use of the referendum the popular will may be vindicated in a particular instance, though with tremendous expenditure of energy. But how much will this accomplish in rehabilitating representative assemblies?

Another proposal has been made, and with increasing frequency of late—that the governor and his cabinet should be permitted to appear in both houses not only to explain and defend administration measures, but also to answer questions relative to public business. Under an Oregon plan, defeated by the voters in 1912, it was even proposed to seat defeated candidates for the office of governor as leaders of the opposition. In any European country to-day it would be regarded as absurd to exclude the executive from free intercourse with the legislature. Nor in the minds of the Fathers was the separation of powers such a rigid thing as its exponents would have us believe to-day. Madison, showing in the *Federalist* how impossible the complete isolation of the departments is, cites the case of New Hampshire, where the doctrine of separation was laid down and the chief executive nevertheless elected by the legislature, made a member of the senate with the right to vote, and advised by a council composed of members of the legislature. Practice under our first two Presidents sanctioned the appearance of cabinet officers in Congress; and since the Civil War, committees, of distinguished personnel, have twice recommended that these officers should be allowed to participate in debates and that they should be compelled to appear for the purpose of answering questions. President Taft, after the close of his administration, endorsed this recommendation strongly, as did his Secretary of War, Mr. Stimson. And why not? Is there some peculiar condition in American government which relieves it from all the necessities taught by European experience? Have our legislative bodies been so successful, relatively to others, that we alone can continue to walk in the steps of Montesquieu? To be accurate, we are not even walking in his steps; for whatever misconception Montesquieu had about the executive power in England, he at least knew that the ministers sat in Parliament and were members of Parliament and led it with a strong hand.

And consider what advantage would proceed from the presence of the governor and his cabinet in the legislature, even without the right to vote. Consider the improvement in ad-

ministration. For the state engineer and the state treasurer (this may recall recent events!) it would be a perpetual grand-jury proceeding, with searching and pertinent questions which they could by no means evade. Constantly subject to criticism, the department heads must be men familiar with legislative ways and able to defend themselves in debate. They must always be alive to the duties of their offices. As the Hon. Samuel W. McCall remarks with regard to the national government, it would no longer be possible to appoint a mediocre lawyer as attorney general.

And consider the inevitable improvement in legislation. No one can doubt that the governor would assume a far more important rôle in this direction; he would present a coherent program which the electorate could fairly judge on its merits because debate would take a higher level and attract public attention in a new way. The members would be infinitely better informed, because openly and of right they could ask for information from the heads of departments and be sure of getting a direct and straightforward reply. The personnel would be greatly improved. Remember that in view of the new position of cabinet officers only men of previous experience in the legislature would eventually be appointed; that good men would come into the legislature and stay there with the expectation of receiving such an appointment; and that the minority party would therefore have at its disposal men who had held or expected shortly to hold cabinet office and who could take an authoritative part in debate. With competent, recognized leaders on both sides—like the front benches in the Commons—opposing arguments would be cogently presented for the legislators and the voters to weigh. It is also probable that the leadership of the governor and cabinet, representing the people of the whole state, would extinguish that all-pervasive subservience to local interests which is so generally decried. Better still, new members, coming up full of good intentions, would find reputable leaders to follow and would no longer have to choose between being relegated to oblivion and accepting affiliations which their conscience could not approve.

And what are the objections to this closer association of executive and legislature? Like the objections to the short ballot they are rather elusive and not always rational when discovered. Governor Spry, of Utah, justified his opposition by saying:

> I may be a reactionary. I plead guilty to being one. . . . I am simple enough to believe that those men were inspired when they wrote the Constitution of the United States. I believe that the Constitution was given to this Republic as an anchorage, and I pray God sincerely that the Republic may never go so far away from the Constitution as to be considered to be drifting from its moorings, because if it does we are liable to go out at sea and drift upon the rocks and go to pieces.

This is the kind of argument which was used in justifying the rotten boroughs of England. Strictly speaking, it is not argument at all. What then do the more or less rational opponents of executive leadership say? Nothing more damaging has been said than that the independence of executive and legislature would be endangered. Perhaps so; personally I view the danger with profound indifference. Separation of powers, though a time-honored theory of American government, is now worn pretty thin, especially in our cities; and theory never counted for much beside practical expediency among men of solid political sense. But there are people, apparently, who would rather see representative assemblies perish from the face of the earth than have their cherished doctrine for one moment under partial eclipse.

PARTICIPATION OF THE EXECUTIVE IN LEGISLATION [1]

OGDEN L. MILLS

Senator-elect from the Seventeenth District of New York

THE very serious problem which confronts us to-day is that of making our state governments more responsible, responsive and efficient, and so restoring them to that degree of public confidence which is absolutely essential to effective government. Aside from the increase of efficiency and responsibility which can be accomplished by diminution of the number of elective executive officers and the concentration of the appointing power in the hands of the governor, many people believe that a closer relationship between the executive and legislative branches will be highly beneficial. Much, of course, can be accomplished by the preparation and submission of administration bills along the lines suggested by Professor Sait, particularly the submission by the governor of an annual budget. The United States is the one civilized country to-day in which a scientific budget is unknown, and there is no question that much of the waste and extravagance which have invariably characterized our governments, both state and national, is due to this fact. The budget is nothing more nor less than an estimate of the cost of running the government for the ensuing year together with suggested methods of raising the necessary funds. Inasmuch as the executive department disburses the money, it is but fair to assume that the executive is in the best position to know the needs, while the legislature, which votes the money, can readily prevent extravagance by being permitted to cut and pare wherever, in its judgment, the appropriations demanded are excessive, but under no circumstances to increase such appropriations. Under the present system there is a tendency on the part of the legis-

[1] Discussion at the meeting of the Academy of Political Science, November 19, 1914.

lature to increase appropriations as reported from committee, not to cut them down, a tendency continually accelerated by the very natural desire on the part of each member to look after his own district.

I am one of those who would go a step further and establish a direct relationship between the executive and legislative branches by giving to the governor and his department heads seats in the legislature, with the right to take part in debate though not to vote. A system of checks and balances by the separation of the three great powers of government is an inherent part of our governmental structure, but we must not confuse separation and isolation. The former may or may not be wise; the latter is fatal, yet it is to the latter that we have been steadily and constantly tending. As Judge Story said in criticizing our present system:

> The heads of the departments are in fact thus precluded from proposing or vindicating their own measures in the face of the nation in the course of debate and are compelled to submit them to other men who are either imperfectly acquainted with the measures or are indifferent to their success or failure. Thus that open and public responsibility for measures, which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away with. The executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements to accomplish its own appropriate purposes, instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives.

There is no question in my mind that the presence of the chief executive in the legislature would result in the passage of wise and beneficial legislation; for who is better qualified to foretell the effect of laws than those charged with their execution? Such participation would also furnish that coöperation and cohesiveness so necessary to the smooth running of any intricate and delicate machine.

Moreover, the governor and his cabinet should be under a duty to answer, upon due notice being given, all proper inter-

pellations. In this way the legislature will most promptly, economically and effectively perform its function of critic, the object of investigations be at once attained without expense and delay, and any wrongdoing be given publicity through the legislature, which will thus perform functions now depending upon the newspapers as the result of our clumsy and inefficient legislative methods. This one benefit is in itself invaluable, as anyone who has studied the English system, or has been present in the House of Commons when "questions" are in order, will testify. Mr. Bryce says:

> British ministers are obliged to tell Parliament everything that is being done in the course of our administration which it is not inconsistent with the public service to disclose. They must answer all questions put to them about what they are doing, and how they are doing it, and why they are doing it. It is good for them. Like other ministers, I have, when a member of the British cabinet, sometimes found the process tiresome. But I never doubted that it was a good thing for everybody concerned.

The great argument against this particular reform is that it would further diminish the power of an already declining legislature. To this view I take sharp exception. Far from weakening the legislature, it would, to my mind, prove invigorating. It is true, of course, that it is becoming increasingly hard to get our ablest men to become senators and assemblymen and that those positions are no longer looked upon with the same degree of honor as they were in the earlier days of the republic. This is due to a great extent to the fact that the legislature has been limited in power, and consequently has diminished in dignity, and in the second place to the fact that it no longer furnishes a real stepping stone to larger and more responsible positions in public life. The presence of the chief executive on the floor of either house would not only add dignity to its debates, but would serve the further purpose of attracting public attention to deliberations which are no longer held with the people as audience. It could not but have a stimulating influence on the members while offering an inducement to ambitious men to enter this branch of

the public service. The last is particularly true when you consider that under such a system a practice would almost inevitably grow up of choosing heads of departments from among the members of the legislature not only because of their familiarity with the machinery of government, but because of their skill in debate acquired while either supporting the administration or opposing it.

Thus might we not reasonably hope to see in a comparatively short space of time the able men of the state serving it in a legislative capacity, and preferring service at the state capital rather than service at Washington as the best means of advancement; our legislatures restored to public confidence and honor; and representative government saved from the attacks which now threaten its very existence?

EDGAR DAWSON

Professor of Political Science, Hunter College

My contribution to this discussion is some added emphasis on two facts: First, that all legislation must and will be the result of leadership; and second, that we must decide whether we want this leadership to be in the hands of a governor whom we elect or in the hands of a party boss with whose election we have nothing to do.

I use the word boss only because there is no other way of conveying my meaning, not because I attribute any undesirable characteristics to the person to whom I apply it. I have in mind the unofficial, somewhat inconspicuous person who really controls a party's councils and directs its policies. Everyone who knows anything of party organization knows that the party is closely organized and that discipline is rigid. There is no doubt in the minds of any of the party workers who is boss, who controls the action of the party. It is this head of the organization or machine to whom I refer when I use the unfortunate term boss.

When one analyzes it, the legislative process falls naturally, it seems, into three elements. These elements are the initiation, the drafting, and the ratification of laws.

One need not argue that initiation is the work of a leader. We know that the initiation of laws in the state of New York is not satisfactorily done at present. There is so much dissatisfaction that there is even talk of adopting the popular initiative, which of course is going in the opposite direction from reform to secure responsibility, though it might in isolated cases be needed, as would a gun behind the door, to use President Wilson's words.

The governor is selected as the representative of the majority of the people of the state. I assume the short ballot in existence, for if we cannot get this amendment when the constitution is revised any talk of reform is out of the question. Everyone with any influence is committed to it. The governor is selected as the representative of the majority party, and he is the only person who does officially represent the whole state. If laws are to be initiated, is not he the person who should speak for the majority? He must see that the party pledges are redeemed. He knows on what principles he has been elected. He will be pointed out with scorn if his administration fails to do the things the people hopefully expected of him and of it.

The initiative is not enough for him to control, however; he must also be empowered to present his bills to the legislature drawn in the form in which he would have them enacted. It is said that Governor Wilson, of New Jersey, went into power on a platform that demanded that grade crossings be abolished. But when he received the bill which the legislature passed to abolish grade crossings, he found that they did not want them abolished, and had therefore written a bill in which they had placed conditions which were impossible. He would have stultified himself had he signed the bill. It was necessary for him to veto a bill providing legislation which he had himself advocated and in which he ardently believed. The need of careful and honest bill-drafting is one of the reasons for doubting the efficacy of the popular initiative and of preferring the reform we are advocating to-day.

But there is no use in sending a well-drafted bill to the legislature unless there is a way of getting action on it. State

legislatures are adepts at letting bills die a natural death. The governor must have the privilege of requiring a vote on his bills within a reasonable length of time. We hear now and then a good deal about the usurpation of the executive. Most of our best governors have been accused of this sort of usurpation—Roosevelt, Hughes, Wilson and others. The expression means that the governor supports his demands that the party platform be carried out, and supports his demand with cogent arguments that appeal to the great body of citizens, thus making those persons who do not find it convenient to carry out the party platform very uncomfortable. They are injured by this sort of executive usurpation. It is the duty of a legislature to impeach a governor guilty of real usurpation. All that the legislature need do to resist the kind of usurpation meant by the critics referred to is to refuse to vote for the governor's bills. Then of course it is necessary for the members to settle with constituents, which may be difficult.

During the last four years the legislature of the state of New York has considered on an average each year about 3,000 bills; it has sent up to the governor each year on an average about 1,000 bills. At least one of these bills contains about 275 large pages. Certainly the legislature does not consider in two houses meeting less than three months in the year this mass of legislation. There is leadership if not dictation in it all; but it is leadership that is willing for a great deal of useless or meaningless legislation to go through in order that other legislation may not attract attention. I would not, however, leave the impression that I impute viciousness, or any more viciousness than is inherent in things human generally. It is not viciousness that I charge; it is inefficient management due to a stupid system.

Whether our present system is the result of a Frenchman's misconception of the English constitution, or of a desire on the part of the fathers of our political system to protect us from the too direct control of the democratic multitude, or is a mixture of these, it is certain that the separation of powers (I do not refer, as Mr. Cleveland in his discussion seemed to suppose, to the *division* of powers, but to their *separation,* or

as Mr. Mills says, their *isolation*) was imposed upon us before our party system was developed. Party management is what makes our system of separation of powers more unbearable than it would otherwise be. As Professor Ford has pointed out, it gives the machine or the leader of the machine an opportunity to become the mediator between the legislature and the executive and thus to secure more or less control of both of them. Neither one can act satisfactorily without the aid of this ever-present mediator.

If the governor is not the leader of his party, then let us find the leader of the party and elect him. If we do not want to elect the boss governor, then let us give the man we do elect an opportunity to act as the party leader, as the one who initiates the policies of his own administration, and requires the legislature to say whether it is willing to do what the leader of the majority believes the party has promised to do.

The separation of powers was imposed upon us when conditions were entirely different from our present conditions. It was accepted under an erroneous impression of the English constitution which we were following. There is no valid argument in favor of it at present except conservatism or stagnation. Why should we not give it up? Is there any reason why the greatest state in the union should not set the example of surrendering this outworn and useless formalism? Where are the defenders of this separation of powers? Who brings forward any reason why it should survive?

We are asking that the state undertake the following reform, which is advocated by many of the most careful students of government, and opposed by none. No practical statesman of any considerable standing believes the change will work anything but good for our public business. Let us provide in the constitution that the governor and his heads of departments may sit in either house of the legislature, and introduce and defend there bills drawn under the governor's direction. Let us give the governor power to require that the legislature vote on the bills thus presented within a reasonable length of time from their introduction.

CONSTITUTIONAL PROVISION FOR A BUDGET[1]

FREDERICK A. CLEVELAND

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IN 1912 President Taft, by special message, submitted to Congress a definite budget plan for the management of national finances.[2] Shortly before the end of his administration he sent a second message,[3] urging that next year's plans and next year's finances be taken up as a whole, and in a manner to locate and define responsibilty for proposals involving the raising and spending of public money. This suggestion was presented to Congress as an alternative to having financial measures split up and virtually decided by one or another of some twenty unrelated congressional committees, and forcing the administration later to patch together enactments like a crazy-quilt after official requests had been dragged over the crooked and thorny paths of legislative compromise. These two efforts to obtain the coöperation of Congress in establishing a budget procedure stand out in four years of President Taft's official life as efforts which received universal approval; even in the face of a bitterly partisan and personal campaign, editorial opinion of all political faiths joined in support of his proposal. Public opinion has reacted in the same way when state and municipal budgets have been proposed. The idea of having some way of presenting a financial plan in a form which can be understood appeals to everyone. Notwithstanding this fact, we are a budgetless people. In the constitutional sense the federal government has no budget; state governments are without budgets; most of our municipalities are without budgets.

[1] Read at the meeting of the Academy of Political Science, November 19, 1914.

[2] *The Need for a National Budget,* House doc. 854, 62d Cong., 2d sess.

[3] *A Budget—Submitted by the President to Congress,* Sen. doc. 1113, 63d Cong., 1st sess.

Confusion of Thought in this Country Concerning a Budget

This is not because we have not been keenly alive to a need for the orderly consideration of public business; but because public men have not had clearly before them what a budget is and its relation to constitutional government. In the United States, the estimates and requests for appropriations are usually called the budget. This very loose use of the term could not obtain if we had an effective budget procedure. Imagine one attempting to give such a meaning to the term "budget" in England, for example, where the departmental estimates of expenditures are submitted to Parliament at a different time and are considered by a different committee than the budget.

Here in America, again, the appropriation bill not infrequently is called the budget. Such is the practice in New York city. But in governments where budgets are made a part of the machinery of public business the appropriation bill could not be so mistaken; often the appropriation items are all voted before the budget is sent in. The British practice is this: Early in each annual session the estimates are submitted to the House of Commons, which, upon hearing them, sits as a committee of the whole house, known as the committee of supply. Each department presents its estimates in a huge quarto volume with minute entries of moneys wanted for the following year. Condensed synopses of these quartos are made with the object of rendering clear the policy back of the requests for money. Any member may ask what pertinent questions he pleases of the minister who is presenting the departmental estimates, so that no request need be passed by without full explanation. After the statement has been completed to the satisfaction of the committee, a vote is taken. But the votes are only the first steps in Parliament's annual supervision of the public finances. In order to consider the means by which money is to be raised to meet the expenditures sanctioned by the committee on supply, the House resolves itself into a committee of the whole, under the name of committee of ways and means. It is to this committee that the Chancellor of the Exchequer submits his budget.[1]

[1] Wilson, *Congressional Government*, pp. 138 *et seq.*

What is a Budget?

So far we have spoken on what a budget is not. Having in mind this confusion of ideas, as well as the purpose of the Academy in bringing the subject before the constitutional convention, would it not be well, even at the risk of tedium, to go over some of the commonplaces descriptive of what a budget is? England is said to be the mother of budgets. There the budget idea was incorporated in its most fundamental constitutional document—Magna Charta. There a settled budget practice long antedated the settled use of the name. The word budget was introduced from the French, but the constitutional principle to which it applies was English. Thus we find that Major General Balfour, in a paper read before the Statistical Society of London, in 1866, said:

> I use the word "budget" in the sense attached to it by M. le Marquis d'Audiffret, . . . an author who appears to be a good authority on financial questions. . . . Monsieur d'Audiffret says the word "budget" or "bouge" or "bougette," according to Pesquier and ancient writers, as well as in the old language of Rabelais, is derived from the Latin word *bulga,* become Gallic, which expresses a bag, a pocket, a purse. England has applied it to the great leather bag which for a long time contained the documents presented to Parliament to explain the resources and the wants of the country. This new interpretation has also been adopted in our language in imitation of the forms and expressions of the constitutional idioms of Great Britain, and only appeared for the first time in the Acts of the French Government, in the decrees of the consuls, in the interval between the month of August 1802, and the month of April 1803, in which this term *budget* replaced the former estimate of receipts and expenditures.[1] [2]

Whatever else a budget is or is not, it must have these essentials: (1) It must be a definite plan or proposal for financing the present and future needs of the state; and (2) it must be

[1] *Journal of Statistical Society,* vol. 29, p. 325.

[2] "*Budget,* a word borrowed from the English, is used in the public administration to signify the annual statement of expenses which it is presumed shall have to be made, and of funds or sources applicable to those expenses."—*Dictionnaire d'Academie Française.*

submitted to a legislative body by an officer who may be held responsible for the wisdom or unwisdom of its proposals, *i. e.* it must serve as an instrument through which both executive and legislative responsibilities to the electorate may be located and enforced.

What a Budget Should Contain

As it is of much importance that there be no question, in this discussion, with respect to what is meant by a budget, I shall be still more concrete and attempt to state what the bundle or bag full of papers referred to should be and contain.

1. A budget should contain a summary statement, in the simplest possible terms, setting forth a proposed plan for financing next year's requirements;[1] and this statement should balance prospective resources against estimates and requests for expenditures.[2]

2. A budget should be an instrument of accountability—a statement prepared by a responsible executive or administrative officer showing present financial conditions and past results.[3]

3. As an instrument of accountability and financial planning, a budget should contain (a) statements showing actual and estimated revenues and expenditures;[4] (b) statements

[1] It should comprehend the fiscal program.—Lowrie, *The Budget*, p. 11.

That the budget should be introduced as a comprehensive document will doubtless be conceded. . . . The budget should be clear, simple, easily understood. . . . About all that the rank and file of the legislative body is called upon to consider is the aggregate of expenditures and the apportionment . . . to the several lines of public service; for so far as income is concerned it is hardly to be expected that individual members . . . will proceed in their analysis . . . beyond a study of general principles underlying the project of law. It is, of course, necessary that estimates should rest on a careful scrutiny of details . . . but this task is either performed by the government or is intrusted to a specially appointed committee.—Adams, *Finance*, p. 142.

[2] A balance of needs and resources of the state.—J. B. Say.

[3] The aim of this report is to give information to the legislative body. . . . The budget is a report on the nation's finances, designed primarily to show to the legislature the condition of the public treasury and the fiscal means of the state.—Adams, *Finance*, p. 105.

In this relation it is of interest to know that the French law puts its budget provisions in that part of the code dealing with public accounting.

[4] The general condition of a nation's finances must be known before a rational

showing actual and estimated financial condition, surplus or deficit.

4. Budget statements showing actual estimated revenues and expenditures should provide all the information needed for considering and determining executive recommendations, as well as legislative action, relative to money-raising policy; and executive recommendations, as well as legislative action, relative to money-spending policy.[1]

5. The budget information pertaining to estimated expenditures should be such as to support and explain items in the appropriation bill, if one is presented with the budget, or, if not, to enable the proper authorities to draw such a bill.

6. Since the amount of money to be voted for payrolls, supplies, *etc.*, must be governed by work to be done, the budget should contain a well-defined "work program"—a statement setting forth what it is that the administration proposes to do with the supplies requested.

7. The "work program" set forth in a budget should be in two parts—one which shows the necessary or proposed costs of rendering public service, and one which shows the proposed costs of making public improvements or betterments—*i. e.*, current expenses and charges should be clearly distinguished from capital outlays.

8. A budget should be transmitted as a part of a speech or message or letter from the responsible officer who prepared the plan or program interpreting the significance of the statement and estimates to the legislative body which is asked to pass on it.

opinion upon any particular proposal, respecting either income or expenditure, can be entertained. . . . It is necessary . . . that a budget statement should begin by an exhibit on a single page of the aggregate of actual receipts and expenditures for the year past; the aggregate of receipts and expenditures, actual and estimated, of the year current; and the aggregate of estimated receipts and expenditures for the year for which laws are enacted.—Adams, *Finance*, p. 142.

[1] To say that the budget statement should be comprehensive, does not, however, answer all the questions that arise respecting its form; for the query still remains respecting the classification of revenue and expenditure most conducive to clearness of discussion and intelligent legislation.—Adams, *Finance*, p. 142.

Still greater concreteness may be given to what is meant by the summaries and statements described by illustrations. For this purpose some of the forms recently submitted to councils of the city of Philadelphia are attached as an appendix to this paper.[1]

The Constitutional Purpose of a Budget

So much for the formal aspects of a budget—the program. The element of responsibility is still to be considered. Critical appraisement of budget forms and procedures can be made only after consideration of their constitutional purpose. The original and fundamental purpose of a budget was to enforce official responsibility. Magna Charta was a protest against irresponsible government; therefore the king was forced to sign an agreement that no revenues would be raised, except after consent and approval by representatives of the people. This fundamental constitutional requirement, this provision for control over revenue-raising, laid the foundation for all modifications in government structure and practice. This principle of constitutional law for curbing official irresponsibility has lain back of all budget procedure. Before the king could obtain consent to his proposals for money-raising, he must do two things:

1. He must satisfactorily explain what he did with moneys previously obtained.
2. He must satisfactorily explain what he proposes to do with future grants.

The constitutional formulae which have followed are found: in the inhibitions laid on spending officers that no money shall be expended except pursuant to an act of appropriation; in the constitutional prescription that the executive shall each year submit to the legislative branch of the government a full statement and account of moneys received and disbursed; in the re-

[1] The summaries shown on pp. 163 *et seq.* following the main text of this paper will serve to illustrate the formal requirements of a budget. The second essential, the element of responsibility for the proposals, is missing in the Philadelphia practice. In New York city, provision is made for the element of responsibility, but the formal element, the program itself, is missing.

quirement that the executive annually shall give information by message of the conditions and needs of the state and recommend such measures as he shall deem expedient. More minute working adjustments have taken the form of enactments, the purpose of which was to make these constitutional principles effective. Control over the purse has been the most powerful influence in differentiating and defining legislative and executive functions—the ultimate force that has determined the development of our whole modern governmental system.

How Control over the Purse was Used to Develop Official Responsibility Abroad

In this relation it is of interest to note the contrast between the development of constitutional provisions for locating official responsibility in the United States and abroad. Up to the time of our independence constitutional government had been largely a matter of unwritten law. The American states organized around the most advanced ideas of responsible government which had been developed through centuries of conflict between Crown and Parliament in England and through a long colonial experience. The American states became the pioneers in expressing these advanced constitutional ideals in written form: the separation of powers; giving to the legislature control over the purse; making executive officers accountable. To these we added the principle of regular and frequent elections, as a means of insuring that those who were selected to exercise political powers would not usurp these powers, that they would remain both responsible and responsive to the popular will.

But after our independence, what happened? Abroad a procedure was gradually evolved which was adapted to making governing officers more responsive to public opinion. England and France, and later Germany, all the nations of Europe, Japan, China, all the British colonies, continued to elaborate the means for holding officers to their responsibilities. Our governmental agencies (national, state, municipal) failed to do this and have become more and more irresponsible—in fact, the most irresponsible of all governments of our time, except

possibly those of Mexico and some of the South American republics. And this growth in irresponsibility has come about largely through a different application of the principle and a different procedure for the exercise of power over the purse. In Europe a procedure was developed requiring the executive to assume responsibility for preparing and submitting a plan, and requiring the legislature to assume responsibility for sanctioning or refusing to sanction executive proposals. Here a procedure was developed which did not require the executive to assume responsibility for preparing and submitting a plan, and which did not make the legislature responsible for acting on the executive proposals. England and the principal European governments adopted the theory of governmental action commonly used by private corporations, the underlying assumption of which is that the chief executive is the only one competent to formulate plans and proposals and bring these before the board for adoption or rejection. Not only did their procedure locate in the executive responsibility for the origination of proposals with respect to work policy and financial policy, but they also formulated a legislative procedure for testing the character and propriety of executive proposals by making the "opposition" effective. The committees of Parliament were so organized that they might serve as the agencies of the "administration;" the floor of Parliament was made the opportunity of the "opposition" to inquire critically into every line of estimates, every detail of the work plans and financial measures of the "administration." This not only had the effect of giving to the country the benefits of strict official scrutiny, of getting every issue before the country, but of giving to the administration the benefit of knowing what the opposition would be before measures were passed. So it was that other governments were made more and more responsible and responsive to public will.

Note the effect of this in the development of the constitutional machinery of Great Britain. Fox, in 1782, was the first minister to admit that he was responsible to the House of Commons as the electoral college, the representatives of the people in their choice of the executive. Prior to that time

ministerial responsibility meant only legal responsibility, and legal responsibility could be fixed only in the entire cabinet. Says Anson in his *Law and Custom of the Constitution*: "There was no instance before 1830 of a ministry retiring because it was beaten on a question of legislation." The formal recognition of executive responsibility to the electorate in England, as we understand it, dates from the Reform Act of 1832. Since that time a procedure has been gradually perfected there that makes the British government more and more nearly what was conceived by our forefathers to be fundamental and to conform with ideals of popular sovereignty. Now the refusal to accept any substantial financial measures submitted and insisted on by the executive amounts to a recall of the executive and may operate as a recall of both executive and legislative.

As has been said, the procedure developed in the leading constitutional governments other than in the United States was one which forced the executive as the constitutional head of the government to stand before the country as the one who must develop a definite business plan; and one which forced him as the operating head of the corporation to lay before parliament the measures which he deemed necessary and expedient. As a condition to favorable action or a vote of confidence it also forced him to render an account of stewardship, to tell what had been done with supplies voted. To make responsibility doubly sure it forced the executive not only to state what his plans were, what supplies would be needed and how revenue might be raised to meet the government's needs, but to formulate authorizations to spend and to raise money in the form of "bills" on which the legislature was to act. The last step was a restriction imposed by Parliament on itself, denying itself the right to increase any item, thereby putting the executive in the position where he must amend his proposed measure if the "opposition" seemed to make this desirable.

How Control over the Purse was Used Here to Develop Official Responsibility

In America all of this would have been possible under our constitution. In fact, a reading of the constitution of the

United States makes it clear that some such procedure was contemplated by the federal convention.[1] It is also quite as clearly worked out in many of our state charters. There can be no question about the intent; *i. e.*, no question about the power of the executive and the power of the legislative branch. The same principle is there but the procedure developed under these fundamental charters was one which gradually operated to defeat this principle. The procedure was not adapted to locating responsibility; it was not adapted to enforcing it through appeal to the electorate. Here not only has official responsibility not been enforced by the legislature through control over the purse, but the power of the legislature to control the purse has been exercised to subvert the underlying purpose of our constitutions. Instead of developing a practice which would hold the executive to strict accountability, as head of the administration, through acts of appropriation and the riders attached, the legislature gradually maneuvered itself into the position of head of the administration and left to the executive practically nothing but his veto power over legislation.

The reason for this is also quite plain. When we adopted our constitution the one great fear was that of executive power. The abuse of executive power was the thing that loomed large in the popular mind during the War of Independence. Since that time we have gone on in the thought that we must protect

[1] "To the President also has been given very definite responsibility. To the end that the Congress may effectively discharge its duties the article of the constitution dealing with legislative power provides that 'a regular statement and accounts of receipts and expenditures of all public moneys shall be published,' and the article dealing with the executive power requires the President 'from time to time to give to Congress information on the state of the Union and to recommend to their consideration such measures as he shall deem necessary and expedient.' . . . Although the President, under the constitution, may submit to Congress each year a definite well-considered budget, with a message calling attention to the subjects of immediate importance, to do this without the coöperation of Congress in the repeal of laws which would be conflicting and in the enactment of laws which would place on the heads of departments duties to be performed that would be in harmony with such procedure, would entail a large expenditure of public money and duplication of work."—Message of President Taft, June 27, 1912.

ourselves from the exercise of executive power. This, like most of our governmental practices, has grown out of a purely negative philosophy. Now we are beginning to long for something positive and we find that our government is tied hand and foot.

The fact that the underlying principles and purposes of our constitutions had been subverted has been before us for thirty years, yet nothing has been done. In 1885 President Wilson, in his work on *Congressional Government,* said:

> We have been conscious . . . that there has been a vast alteration in conditions of government, that the checks and balances are no longer effective and that we are really living under a constitution essentially different from that which we have been so long worshiping as our own peculiar incomparable possession. . . . The noble charter of fundamental law given us by the convention of 1787 . . . is now our form of government rather in name than in reality.

What was also pointed to at that time and what the whole people have come to realize is this, that our real danger is not the exercise of power, but irresponsibility. To paraphrase President Wilson's conclusions in this respect: every phase and detail of administration is reduced to prescription of law by a legislature composed of hundreds of members, each of whom has his eye on a local constituency—men who have no responsibility to the state or nation as a whole, who have no responsibility for administrative acts or results. Public business that costs the country millions of dollars each year is conducted by an irresponsible bureaucracy, operating under the direction and control of irresponsible legislative committees. There can be only one result—irresponsible government.

Five Propositions for the Consideration of the Constitutional Convention

The purpose of this meeting is to raise questions for consideration by the constitutional convention. With respect to provisions that have to do with control over the public purse, two negative and four positive proposals are submitted, *viz.*:

1. That while to the legislature of the state is given the

power to raise money and to make appropriations, the legislature is not and in the very nature of things cannot be effective as a budget-making body.

2. That the state "Board of Estimate" as at present legally constituted cannot be an effective budget-making body, that the preparation of an annual statement and a plan for financing future expenditures by such a body cannot do otherwise than defeat every constitutional purpose which a budget is to serve.

3. That preparation and submission of a budget is essentially an executive function.

4. That an executive cannot be effective as a budget-maker unless he is provided with a specialized "staff," which will have no responsibility for the execution of policies involving the expenditure of money.

5. That an executive "staff" which prepares the budget should be responsible to the executive or head of the "line" of administrative authority; and that the head of the "line" must be responsible to the electorate.

6. That, with a view to enforcing responsibility on the executive as well as on members of the legislature, the legislative branch should be so organized as to make the "opposition" effective—this in place of the present theory and practice of legislative organization, the purpose of which is to smother opposition.

The Legislature not an Effective Budget-Making Body

Frequently in this country the legislature is spoken of as the budget-making body. This is among the worst of our fallacies. Constitutionally, the legislature is and must remain the branch through which control over the purse is exercised. To this end it is necessary that the constitution shall retain the inhibitions that no money shall be raised or expended except pursuant to its acts. But this is quite a different thing than making a budget. To confuse an act of appropriation with a budget is like confusing a resolution of a board of directors of a corporation with the annual report.

As has been said, a budget to serve its constitutional purpose must have two essentials: it must serve as a report on the re-

sults of past management which carries a well-considered plan and financial program for the future; and it must be prepared and submitted to the legislature by someone who can be held responsible to the body politic for its proposals. The legislature cannot meet either of these requirements. The personnel of the legislature cannot report on the results of past management and be effective in the formulation of plans for future work because it is not in charge of the details of public business, and even if it could, its report and proposals could not serve the purpose of a budget. The underlying purpose of a budget is to force the executive to account for supplies previously granted, and to lay before the legislature and the country his plans before another grant is made. The only effective function that the legislature can perform is that of an agency of review and inquiry on the one hand, and of decision with respect to matters of policy on the other. When the legislature itself undertakes to formulate plans for the administration, the country is deprived of all the benefits of a budget. Even if the legislature were a small body, it would be in no better position to prepare and submit to itself or to the country a report and financial prospectus with recommendations than is a board of trustees of a private corporation which as a matter of business sense puts this responsibility on the chief executive. Recognizing the impracticability of such action on its part, the board of trustees requires the president of the corporation to submit at the annual meeting a statement of affairs and a definite program for the approval of the board as a guide for action.

Again, the personnel of the legislature cannot be held responsible to the electorate for the plan and proposals submitted. Each member represents a local or narrow interest. No member knows what is required to facilitate the business in hand. No member has before him the needs of the state as a whole. No member can be held to account for his acts to the state electorate as a whole, but even if he could, he is not in touch with the everyday needs of the government as they have developed in course of administration. It is in recognition of the local and restricted interest and contact of each

member of the legislature that a political party united by some expression of principle, rather than the individual, has become the instrument for enforcing responsibility in acting on budget proposals and other legislative matters.

The State "Board of Estimate" not Adapted to Budget-Making

In 1913 an act was passed establishing a state board of estimate.[1] The primary purpose of this board was to make a budget. The board is made up of the governor, lieutenant-governor, president *pro tempore* of the senate, chairman of the finance committee of the senate, speaker of the assembly, chairman of the ways and means committee of the assembly, controller, attorney-general, and commissioner of efficiency and economy—four members *ex officio* of the legislative branch and five members *ex officio* of the executive and administrative branch of the government.

The powers and duties of this board as defined by statute are as follows:

1. To keep minutes of meetings which shall be open to public inspection.
2. To prepare "estimates" of amounts required to be appropriated.
3. To examine all requests for appropriations.
4. To hold such public hearings as may be advantageous.
5. To transmit its estimates to the legislature with such recommendations, reasons, and explanations as shall be determined.
6. To prescribe forms for the preparation of departmental estimates.
7. To transmit the estimates of the department with its own estimates to the legislature.
8. To afford heads of departments a reasonable opportunity for explanation and hearing.
9. To make an estimate of all moneys required to be appropriated for the payment of interest and sinking funds.

[1] An Act to Establish a State Board of Estimate.—*Laws of 1913*, ch. 281.

10. To make an estimate of the revenues of the state expected to be received during the next fiscal year and to make such recommendations with respect thereto as shall be deemed appropriate.

11. To ascertain and report the amounts of all unexpended balances of appropriations theretofore made and to make such recommendations to the legislature as shall be deemed appropriate for the disposition thereof.

From the foregoing analysis it will be seen that the personnel and the duties are partly executive and partly legislative. Not only is the plan itself one which tends to confuse rather than to define responsibility, but the futility of such an agency for the purpose was shown the first year. The board was unable to agree; it failed to formulate definite proposals; it did not submit to the legislature a report.

In this relation it is also to be noted that at the time this committee was created, there were two other agencies on which had been conferred powers similar in character, namely, the controller, and the commissioner of efficiency and economy. For example, the latter officer was given the following powers: [1]

1. To make a careful and thorough study of each office.

2. To examine the accounts and methods of business accounting and administration of the several offices.

3. To prescribe forms for the submission of departmental estimates.

4. To examine such statements and to make such recommendations as in the opinion of the commissioner would contribute to promote efficiency and economy in the administration of the state's business.

Pursuant to the powers which were given to the commissioner of efficiency and economy and to the controller, each of them made a report to the legislature with recommendations bearing on next year's finances. However, the controller confined his attention largely to the discussion of proposals for

[1] An act to provide efficiency and economy in the public service and to create a department of efficiency and economy.—*Laws of 1913*, ch. 280.

raising revenues, and the commissioner of efficiency and economy confined his report largely to recommendations with respect to the appropriations.

Budget-Making Essentially an Executive Function

Mention has already been made of the practical reason for having the executive or administrative branch of the government prepare and submit an annual statement of affairs, with proposals for the consideration of the legislature. There is another and still more vital reason for making the chief executive the one to prepare and submit these proposals. This reason relates to the second essential of a budget, namely, that the budget-making officer should be one who may be held responsible to the electorate. The governor is the only officer chosen by a state-wide constituency on whom this important function may devolve. Various other officers have been required to perform this function for state government, but to little purpose. Even though other officers may be elected at large, they have little or no responsibility for the business to be reported and proposed. The governor is the head of the administration; he can be made responsible only by requiring him to submit to the legislature a definite financial plan or program, with recommendations as to what shall be undertaken by the state. But the requirement that the chief executive shall make and submit a budget is not all that is necessary to define responsibility. The proposals must stand on their own merits. If every member of the legislature is permitted to come in and tinker with the plan before adoption, all responsibility is destroyed. If it will not stand criticism, then the executive should be required to amend it so that it will still be his plan, and if the executive is not able or willing to submit a plan which will be approved, then some method must be provided for getting the issues before the electorate. This can be done in any one or several of these ways: (1) by giving to the executive the power to prorogue; (2) by giving to the legislature the power to call an election; (3) by a provision in the constitution authorizing the administration to run on the basis of previous appropriation until the next elec-

tion; or (4) by giving to the electorate a right to recall the governor and the legislature.

A Specialized Staff an Essential

In nine states constitutional provision has been made requiring the governor "to present estimates, at the commencement of the session, to the legislature of the amount of money required to be raised by taxation for all state purposes." [1] These provisions, however, have failed in part at least to fulfil their purpose for lack of an effective staff agency by means of which the executive may inquire into working conditions, keep himself informed and formulate well-considered plans for the future. In fact, it may be said that government in this country has differed essentially from governments abroad, in that we have almost wholly disregarded the "staff" side of our political organization.

As time goes on, as our public institutions have become more complex, executive officers have had an increasing load of responsibilities placed upon them by law with no added means provided for their discharge. The result is that from the first day of official life they have found that they were slaves to an official grind which left little or no opportunity for planning or for the consideration of plans. In public, as well as in private business, there has been an increasing need for the development of a "staff," an agency which will be free from the routine of administration, one which may devote itself to inquiry and to the preparation of plans; to the consideration of results; to the making of recommendations; and to advising with executive officers on matters that are before them for decision.

The primary purpose of a budget is institutional planning. An institutional plan must necessarily be based on consideration of the details of work-plans. Each service to be performed, each improvement to be made, must be taken up with a view to determining what are the needs to be met and what are the requirements in order to meet these needs. There

[1] Frederick J. Stimson, *Federal and State Constitutions of the United States*, pp. 242-3.

must be careful consideration of the wisdom or lack of wisdom of proposals made by the various offices and departments. These are interested in the development of their own services. But, if responsibility is to be defined and enforced all plans should "clear" through the chief executive—the one who must stand or fall on his record. To become effective, therefore, as a budget-maker, the chief executive must be provided with a specialized staff free from administrative burdens and responsibilities that it may approach consideration of executive policy and needs and the expenditure of public money objectively—a staff which is both adequate and competent independently to advise the chief executive on every matter of state business.

The Budget-Making Staff Should be Responsible to the Executive

Accepting the budget as an executive document, there is the same reason for making the "staff" which prepares it an executive agency, responsible to the governor. This is supported not only in reason, but in experience. In England, for example, the responsible head of the government is the Prime Minister. He usually chooses the portfolio of the treasury, because this is not a department of public service. Under the Prime Minister in the treasury is an executive officer corresponding roughly to our Secretary of the Treasury. The Chancellor of the Exchequer is himself largely detached from the various public-service departments and is in position independently to review their action. But below him are various staff agencies which have been set aside for the specific purpose of auditing and reviewing the transactions of departments, preparing reports and formulating plans for financing the government's needs. Although there are differences in organization for accomplishing the result, the same principle obtains in all European countries. It is a peculiar fact that although we have been developing staff agencies in this country in various departmental service relations no staff agency has been developed around the work of planning the government's business as a whole, except the recently established staff agencies

of the board of estimate and apportionment of the city of New York and a few other cities; and in various civil service commissions, which later have had the negative purpose of standing in the way of the exercise of executive power instead of being of service to the executive in the development of an efficient personnel.

An Effective "Opposition" Necessary to Enforce Responsibility

Reference has been made to the procedure in the House of Commons for giving the " opposition " a chance, especially in discussion of authorizations to the administration to raise and spend money. To this end departmental estimates are submitted to Parliament long before the budget is sent in. Parliament then decides what time will be given to the consideration of these estimates. After this has been fixed, the House regularly under its rules resolves itself into a committee of the whole to give the " opposition " an opportunity to ask questions about the items requested. When submitted, the estimates have already been gone over by representatives of the majority. In other words, through caucus and committees the chief executive takes the steps necessary to find out what will be the attitude of the supporters of the administration. The chief executive and the country as well have the advantage of developing the " opposition " on the floor of the house. Contrast this with our own method. Our whole legislative practice has developed on the principle of "gag rule." The purpose has been to smother the opposition, giving no opportunity for intelligent criticism before measures are passed. The administration and the majority party, therefore, go ahead blindly until the next election when they wake up to find that they have been relegated to the political junk-heap; men who have tried to serve their constituency well have been given a vote of " lack of confidence," with no opportunity to adjust themselves and their policies to public opinion. The effect of our system is, therefore, not only to deprive the government of the benefit of criticism on the part of those who have opposing views, but to defeat all effort toward establishing responsible government. While we have developed more orderly methods, the

result is essentially the same as in Spanish American countries. The people are always in the attitude of wanting a change. They do not pass on issues which arise in the course of business with a view to enforcing responsibility; they follow a leader who promises well, then sit by and wait on the committee on rumor till another candidate presents himself with new promises. Under such circumstances there can be no continuity of policy; and an irresponsible bureaucracy subservient to irresponsible legislative committees is the only thing that can survive.

Recommended Changes in the Constitution

Since the purpose of this meeting is to develop concrete, constructive recommendations as well as discussion of constitutional principles I have the following to propose:

1. That in the part of the constitution dealing with the executive, it be required of him that he shall each year and not later than one week after the beginning of the regular legislative session submit departmental estimates with an appropriation bill in such form and with such conditions attached as shall be deemed desirable to promote the efficiency of the public service and the economy of expenditures; and that, not later than sixty days after the beginning of the regular session, he shall submit to the legislature a budget which shall contain a financial plan for the next fiscal year, supported by summary statements setting forth (a) the actual and estimated revenues and expenditures for a period beginning not less than two years prior to the period to be financed; (b) the present assets, liabilities and surplus or deficit, and the estimated conditions as of the beginning and the end of the period to be financed; (c) the present condition of funds and the estimated condition of funds as of the beginning and end of the period to be financed; (d) such revenue bills as are deemed necessary to meet the financial needs and ratably and equitably to distribute the public charges; (e) such measures for borrowing and refunding the public debt as may be deemed expedient; and (f) a message in support of the measures and explanatory of the proposals submitted.

2. That in the part of the constitution dealing with the legislature, the following provisions be made: That upon receiving the departmental estimate of expenditures with the appropriation bill the assembly shall resolve itself into a committee of the whole house not less than one day each week, at which time the governor and heads of departments may have the privilege of the floor to present the estimates submitted, to explain the appropriations requested, and to answer such questions as may be raised with respect to items or proposed conditions to be attached to items of the appropriation bill; that upon receiving the budget with any amendments which the governor may propose to the appropriation bill previously submitted and discussed, the assembly may take such further time in discussion of items and conditions as may be determined, but no amendment shall be in order except an amendment to reduce, and no new subject or item may be appropriated for except by separate bill which may be independently vetoed by the governor, whose veto shall be final; that in case the legislature is unable to agree on the appropriation bill as submitted by the governor, or as reduced by the assembly, the several established departments, bureaus and offices shall be authorized to expend the same amounts and under the same conditions as were previously authorized; that all appropriations for the legislature, and all appropriations for the courts and for officers not under the jurisdiction of the governor, shall originate in separate bills, which shall be subject to the veto of the governor as other legislation, and the legislature and the courts and other officers not under the jurisdiction of the governor shall be required to submit to the governor their estimates within one week after the regular session begins.

3. That an office and department of auditor-general be created, the head of which shall be elected from the state at large, and in this part of the constitution it be made the duty of the auditor-general to audit revenues and expenditures and the receipts and disbursements as well as the property and other accounts and reports of the treasurer, and of each of the departments, bureaus and offices; the powers of the auditor-general to be confined entirely to the function of independent

audit and report, such reports to be made to the legislature and printed for public distribution.

4. That in the new constitution provision be made for the establishment of a bureau of executive control under the governor, at the head of which would be a comptroller who would be appointed by the governor and under whom would be organized the following divisions:

1. A division of legal advice on matters of administration.

2. A division of planning and standardization, the purpose of which would be: to prepare constructive recommendations to the governor; to review and advise the governor with respect to the laws of the departments; to review and recommend action on allotments; to promulgate procedures governing the methods of transacting public business, in so far as these may not be delegated by the governors to the departments; to develop unit standard specifications and standards for judgment of the efficiency and economy of the administration; and to promulgate methods of accounting and reporting.

3. A division for the compilation of reports and statistics, one of the functions of which would be to coöperate with the division of planning and standardization in the preparation of the annual budget.

4. A bookkeeping division, the duties of which would be to keep central and controlling accounts of the government, and to prepare current reports therefrom, in accordance with standards promulgated.

5. A division of inspection, the purpose of which would be to inspect independently and to prepare reports for the controller to the governor on work and methods of the several departments, bureaus and offices for which he is responsible.

APPENDIX TO MR. CLEVELAND'S PAPER

ILLUSTRATIONS OF BUDGET SUMMARIES ADAPTED TO SUBMISSION BY THE EXECUTIVE TO THE LEGISLATIVE BRANCH OF THE GOVERNMENT

Exhibit 1. Summary showing "*financial plan*" for the next fiscal period.

Exhibit 2. "*Balance Sheet*"—showing actual and estimated current assets, liabilities and reserves of the government as a body corporate.

Exhibit 3. "*Operation Account*"—actual and estimated revenues and expenditures.

Exhibit 4. "*Surplus Account*"—an analysis of actual and estimated net charges in the relation of assets and liabilities.

Exhibit 5. "*Receipts*"—actual and estimated, available for the general fund.

Exhibit 6. "*Fund Statement*"—showing the actual and estimated condition of funds.

Exhibit 7. "*Expenditures*"—actual and estimated by organization units under the jurisdiction of the mayor.

Exhibit 8. "*Expenditures*"—actual and estimated by organization units not under the mayor.

Exhibit 9. "*Public Service Program*"—expenditures actual and estimated, classified by functions or activities.

Exhibit 10. "*Contracting and Purchasing Requirements*"—actual and estimated expenditures classified to show amounts of things bought or to be bought and contractual obligations made or to be made; also recapitulation of character of use.

(A further Exhibit, "*Public Improvement Program*," was not prepared. This, however, should be made a part of a budget.)

EXHIBIT 1.—"FINANCIAL PLAN" FOR THE NEXT FISCAL YEAR.

Appropriations Authorized and Requested.	Total.	Expenses.	Fixed Charges.	Contingencies.	Capital Outlay and Debt Payments.
Estimated Expenditures for 1915:					
Personal services	$15,694,908.00	$15,694,908.00	—	—	—
Services other than personal	6,270,334.12	6,270,334.12	—	—	—
Materials	789,301.24	789,301.24	—	—	—
Supplies	2,805,731.02	2,805,731.02	—	—	—
Equipment and parts	712,777.62	*112,777.62	—	—	*$600,000.00
Structures	*4,684,995.92	*290,489.50	—	—	*4,394,506.42
Land	*750,000.00	—	—	—	*750,000.00
Capital outlays for rights and obligations	4,080,243.26	—	—	—	†4,080,243.26
Fixed charges and contributions	5,726,552.45	—	‡$4,181,954.13 1,544,598.32	—	—
Pensions and retirement salaries	185,000.00	185,000.00	—	—	—
Payments arising from the relation of agents	46,500.00	—	—	$46,500.00	—
Total estimated requirements	$41,746,343.63	$26,148,541.50	$5,726,552.45	$46,500.00	$9,824,749.68
Estimated Current Funds Available:					
General fund surplus—as of December 31, 1914 $1,495,567.95					
General fund revenues (on present basis). 31,475,448.64	$32,971,016.59	$23,117,720.88	‡$4,181,954.13 1,544,598,32	$46,500.00	†$4,080,243.26
Loan funds required	5,744,506.42	—	—	—	5,744,506.42
Total estimated funds available.	$38,715,523.01	$23,117,720.88	$5,726,552.45	$46,500.00	$9,824,749.68
Unfunded Estimated Expenditures for 1915:					
General fund revenues	3,030,820.62	3,030,820.62	—	—	—
Total amount to be funded	$41,746,343.63	$26,148,541.50	$5,726,552.45	$46,500.00	$9,824,749.68

* Estimate of Controller on basis of past experience. † Debt payments direct and through sinking fund. ‡ Interest payments.

(191)

* Estimate of Controller on basis of past experience. † Debt payments direct and through sinking

EXHIBIT 2.—"BALANCE SHEET"—SHOWING ACTUAL AND ESTIMATED CURRENT ASSETS, LIABILITIES AND RESERVES, OF THE GOVERNMENT AS A BODY CORPORATE.

Assets.	January 1, 1914 (actual).	September 30, 1914 (actual).	December 31, 1914 (estimated).	December 31, 1915 (estimated).
Cash	$3,516,940.12	$8,749,179.88	$3,830,490.11	$2,409,230.16
Amounts due to the city:				
Taxes receivable	15,993,189.63	2,828,232.08	1,092,237.51	1,211,764.32
Water rents receivable	4,295,617.00	317,974.01	115,424.30	132,679.21
Personal property taxes receivable	2,278,342.44	344,321.71	95,274.95	125,292.42
Departmental accounts receivable	—	—	47,966.68	95,935.36
Delinquent taxes	2,141,897.69	1,320,921.94	1,232,602.76	1,296,018.53
Delinquent water rents	171,020.92	74,133.47	34,131.31	45,774.46
Delinquent state taxes	290,799.42	53,437.41	24,143.67	36,177.25
Delinquent public building tax	482.53	476.27	474.00	465.47
Delinquent departmental accounts receivable	163,574.78	149,718.86	66,264.14	74,239.14
Claims against the Commonwealth for primary election expenses	296,943.14	453,858.41	453,858.41	623,858.41
Suspense account—Due from receivers of failed depositories	103,221.18	78,651.18	78,651.18	53,651.18
Stores on hand	640,018.26	588,196.23	630,542.21	621,066.16
Postage on hand	1,645.79	3,968.60	4,000.00	4,000.00
Rentals accrued—not due	906.24	—	906.24	906.24
Securities	29,401.00	25,192.00	25,192.00	20,983.00
Total assets—general account	$29,924,000.14	$14,988,262.05	$7,732,159.47	$6,752,041.31

EXHIBIT 2.—*Concluded.*

Liabilities, Reserves and Surplus.	January 1, 1914 (actual).	September 30, 1914 (actual).	December 31. 1914 (estimated).	December 31, 1915 (estimated).
Immediate demands for cash:				
Vouchers audited	$1,083,247.84	$112,559.34	$1,019,989.19	$1,080,020.40
Warrants payable	103,051.42	102,328.95	123,539.63	155,722.31
Invoices payable	248,244.77	—	175,258.08	211.751.42
Mandamuses payable	8,706.75	293,384.31	586,768.62	—
Duplicate and excess taxes and water rents payable	51,370.05	62,317.92	37,207.16	50,465.30
Advances from capital account	—	27,569.37	—	—
Advances from special and trust accounts	—	31,694.92	—	—
Reserves:				
Unaccrued taxes	15,993,189.63	3,985,992.33	—	—
Unaccrued water rents	4,295,617.00	1,061,600 08	—	—
Unaccrued personal property taxes	2,278,342.44	688,449.37	—	—
Expenses accrued—not due	—	1,941,219.40	—	—
For non-collection of delinquent state tax	284,207.14	284,207.14	108,865.00	196,536.07
For losses on account of failed depositories	103,221.18	78,651.18	78,651.18	53,651.18
Interest accrued—not due	14,900.00	—	14,900.00	14,900.00
Rents accrued—not due	150.57	—	150.57	150.57
Surplus—cash over immediate demands for cash	* 2,330,640.86	* 8,534,291.59	* 2,686,961.29	* 1,273,487.45
Surplus—other assets over other liabilities and reserves.	3,129,110.49	** *2,216,003.85*	2,899,868.75	3,715,356.61
Total surplus	$5,459,751.35	$6,318,287.74	$5,586,830.04	$4,988,844.06
Total liabilities, reserves and surplus—general account	$29,924,000.14	$14,988,262.05	$7,732,159.47	$6,752,041.31

* See "Unapplied (net cash) Balance"—General Fund Balance Sheet, Exhibit 5.

** Excess other liabilities and reserves over assets other than cash.

EXHIBIT 3

"OPERATION ACCOUNT" ACTUAL AND ESTIMATED REVENUES AND EXPENDITURES

Revenues Accrued	January 1 to September 30, 1914 (actual)	October 1 to December 31, 1914 (estimated)	January 1 to December 31, 1914 (actual and estimated)	January 1 to December 31, 1915 (estimated)
Taxes	$11,988,228.92	$3,985,992.33	$15,974,221.25	$16,172,584.16
Water Rents	3,210,205.18	1,061,600.08	4,271,805.26	4,100,000.00
Personal Property Taxes	1,827,426.01	688,449.37	2,515,875.38	2,280,000.00
Miscellaneous	6,528,114.32	1,609,981.32	8,138,095.64	9,555,785.31
Total Revenues	$23,553,974.43	$7,346,023.10	$30,899,997.53	$32,108,369.47
Excess of Expenses over Revenues	—	—	—	3,893,467.74
Total	$23,553,974.43	$7,346,023.10	$30,899,997.53	$36,001,837.21

Expenses incurred and Payment of Debt	January 1 to September 30, 1914 (actual)	October 1 to December 31, 1914 (estimated)	January 1 to December 31, 1914 (actual and estimated)	January 1 to December 31, 1913 (estimated)
Administration	$ 2,548,843.12	$ 549,614.37	$ 3,598,457.49	$ 2,489,818.50
Operation	13,229,527.84	2,203,342.81	16,092,870.65	19,090,976.96
Maintenance	1,203,053.46	840,727.79	2,714,565.34	4,391,291.04
Debt Service	5,637,818.72	3,176,983.15	7,044,017.78	8,865,313.51
Other Expenses	716,540.98	238,847.00	955,387.98	1,164,437.20
Total Expenses and Payment of Debt	$23,335,784.12	$7,069,515.12	$30,405,299.24	$36,001,837.21
Excess of Revenues over Expenses	218,190.31	276,507.98	494,698.29	—
Total	$23,553,974.43	$7,346,023.10	$30,899,997.53	$36,001,837.21

EXHIBIT 4

"SURPLUS ACCOUNT" AND ANALYSIS OF ACTUAL AND ESTIMATED NET CHANGES IN THE RELATION OF ASSETS AND LIABILITIES

Surplus at Beginning of Period (see General Account Balance Sheet)	$5,459,751.35	—	$5,459,751.35	$6,586,830.04
Credits to Surplus:				
Excess of Revenues over Expenses (as above)	218,190.31	$276,507.98	494,698.29	—
Cash transferred to General Account from P. R. T. Street Repair Account	234,131.72	—	234,131.72	—
Cash transferred to General Account from S. P. C. A. Account	4,360.00	—	4,360.00	—
Cash transferred to General Account from Capital Account ($3,160,000—1914) Loan	175,000.00	—	175,000.00	—
Cash received from Receiver of Tradesmen's Trust Company	24,570.00	—	24,570.00	25,000.00
Additions to Delinquent Taxes	1.16	.29	1.45	24,937.52
Additions to Delinquent Water Rents	914.75	228.69	1,143.44	11,031.23
Additions to Delinquent State Taxes	251,071.72	—	251,071.72	145.21
Additions to Inventory of Postage on Hand	2,990.38	—	2,990.38	—
Estimated Advances from the Capital Account, 1915	—	—	—	2,500,000.00
Total	$6,370,981.39	$276,736.96	$6,647,718.35	$9,147,944.00
Charges Against Surplus:				
Excess of Expenses over Revenues (see above)	—	—	—	$3,893,467.74
Allowances and Reductions of Delinquent Taxes	$ 8,548.20	$ 2,137.05	$ 10,685.25	44,424.84
Allowances and Reductions of Delinquent Water Rents	24,167.85	5,041.96	29,209.81	29,571.30
Allowances and Reductions of Delinquent State Taxes	62.60	1,015.65	1,078.25	171,636.06
Invoices of 1913 Audited in 1914 in excess of amount reported by Departments as of December 31, 1913	19,915.00	—	19,915.00	20,000.00
Surplus Carried to General Account at end of Period	6,318,287.74	268,542.30	6,585,880.04	4,988,844.06
Total Debits	$6,370,981.39	$276,736.96	$6,647,718.35	$9,147,944.00

EXHIBIT 5.—"RECEIPTS"—ACTUAL AND ESTIMATED AVAILABLE FOR THE "GENERAL FUND."

General Fund.	1911 Tax Rate $1.50	1912 Tax Rate $1.00	1913 Tax Rate $1.00	1914 Tax Rate $1.00	1915 Tax Rate $1.00
Amount of revenue from taxes	$21,267,749.39	$14,881,096.09	$15,117,313.25	$15,655,942.95	$16,172,584.16
Estimated amount to be deducted as uncollectible within year	457,286.97	353,067.71	409,196.39	364,283.14	436,316.78
Estimated amount collectible within the year	20,810,462.42	14,528,028.38	14,708,116.86	15,291,659.81	15,736,267.38
Amount of revenue from personal property taxes	*	*	*	$2,120,000.00	$2,280,000.00
Estimated amount to be deducted as uncollectible within year	*	*	*	132,866.70	196,604.05
Estimated amount collectible within the year	*	*	*	$1,987,133.30	$2,083,395.95
Estimated miscellaneous receipts	$13,849,448.93	$14,324,777.62	$14,667,052.66	$13,736,411.11	$13,655,785.31
Total estimated receipts	$34,659,911.35	$28,852,806.00	$29,375,169.52	$31,015,204.22	$31,475,448.64
Amount to be deducted for lawful obligations:					
Interest and principal of non-sinking fund loans, payments to sinking funds, State tax, mandamuses, etc.	9,232,281.93	10,112,287.50	10,677,877.50	11,362,442.50	9,099,313.51
Allotments for Board of Public Education—five (5) mills (50 cents per $100) on total assessment of real property, as per Act of April 22, 1905	†7,285,542.67	†	†	†	†
Total lawful obligations	$16,517,824.60	$10,112,287.50	$10,677,877.50	$11,362,442.50	$9,099,313.51
Amount available for departmental appropriation	$18,142,086.75	$18,740,518.50	$18,697,292.02	$19,652,761.72	$ 22,376,135.13
Additional funds available for appropriation at closing of year's books	2,399,072.85	2,040,427.81	1,125,563.84	1,494,514.89	**
Total funds available for departmental appropriation	$20,541,159.60	$20,780,946.31	$19,822,855.86	$21,147,276.61	**
Merging balances included above in additional funds available for appropriation at closing of year's books	236,228.52	571,824.14	788,842.59	845,102.69	**
Estimates for mandamuses included among the lawful obligations	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00	§200,000.00

* Prior to 1914 the four (4) mill personal property tax was a State tax; three-quarters of it, however, was paid by the State to the city and is included in those years in miscellaneous receipts.

† Five (5) mills or fifty (50) cents on $100 of valuation appropriated to Board of Public Education in 1911: School District of Philadelphia levied a tax of five (5) mills in 1912, 1913 and 1914, which tax was in addition to the city tax of $1.

** Not available until December 31, 1914.

§ The City Treasurer's estimate of mandamus expenditures for 1915 is $1,200,000, of which it is estimated $200,000 will be required for running expenses and $1,000,000 for capital outlays. It is estimated that only the mandamus requirements for running expenses will be met out of the general fund, and that the capital outlays will be met from loan funds.

EXHIBIT 6.—"FUND STATEMENT"—SHOWING

General

Debit Balances.	January 1, 1914 (Actual).	September 30, 1914 (Actual).	December 31, 1914 (Estimated).	December 31, 1915 (Estimated).
Appropriation Accounts (Estimated Receipts and Net Assets):				
City Controller's Estimated Receipts	$31,015,204.22	†$3,445,898.32	—	—
Unapplied (Net Cash) Balance	*2,330,640.86	*8,534,291.59	*$2,686,961.29	*$1,273,487.45
Total Debit Balances	$33,345,845.08	$11,980,189.91	$2,686,961.29	$1,273,487.45

* See "Surplus—Cash over immediate Demands for Cash"—General Account Balance Sheet.
† Balance of the City Controller's Estimated Receipts for 1914 yet to be collected.

Loan

Loans Unissued and Net Assets:				
Loans Authorized and Unissued	$13,150,000.00	$6,210,000.00	$16,785,000.00	$16,285,000.00
Unapplied (Net Cash) Balance	*10,012,329.40	*7,864,441.52	*6,258,712.69	*6,860,274.37
Total Debit Balances	$23,162,329.40	$14,074,441.52	$23,043,712.69	$23,145,274.37

* See "Surplus—Cash over immediate Demands for Cash"—Capital Account Balance Sheet.

Park

Unapplied (Net Cash) Balance	*$9,938.37	*$12,077.75	*$12,275.48	*$12,885.68
Total Debit Balances	$9,938.37	$12,077.75	$12,275.48	$12,885.68

* See "Surplus—Cash over immediate Demands for Cash"—Feeble-Minded Building Account.

ACTUAL AND ESTIMATED CONDITION OF FUNDS.

Fund.

Credit Balances.	January 1, 1914 (Actual).	September 30, 1914 (Actual).	December 31, 1914 (Estimated).	December 31, 1915 (Estimated).
Appropriation accounts (Unexpended Balances):				
Unencumbered Balance of Appropriations	$31,166,577.18	$9,220,129.60	$689,924.90	$530,076.20
Reserve for Contracts	493,162.29	2,532,201.00	501,468.44	584,594.80
Unappropriated Balances:				
Funds Available for Appropriation.	1,511,105.61	227,859.31	1,495,567.95	158,816.45
Reserve for Mandamuses	175,000.00	—	—	—
Total Credit Balances	$33,345,845.08	$11,980,189.91	$2,686,961.29	$1,273,487.45

Funas.

Appropriation accounts (Unexpended Balances):				
Unencumbered Balance of Appropriations	$6,166,679.48	$10,564,133.44	$18,333,859.68	$17,500,369.17
Reserve for Contracts	3,554,945.21	3,501,187.24	4,709,853.01	5,644,905.20
Unappropriated Balances:				
Funds Available for Appropriation.	290,692.65	9,120.84	—	—
Reserve for Mandamuses	12.06	—	—	—
Reserve for Loans Authorized and Unissued.	13,150,000.00	—	—	—
Total Credit Balances	$23,162,329.40	$14,074,441.52	$23,043,712.69	$23,145,274.37

Funa.

Unencumbered Balance of Appropriations	$2,034.93	$7,164.52	$4,358.26	$4,368.88
Funds Available for Appropriation	7,903.44	4,913.23	7,917.22	8,516.80
Total Credit Balances	$9,938.37	$12,077.75	$12,275.48	$12,885.68

EXHIBIT 7.—EXPENDITURES, ACTUAL AND ESTIMATED, BY ORGANIZATION UNITS UNDER THE JURISDICTION OF THE MAYOR

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Grand total	$24,423,481.42	$34,336,280.72	$17,683,176.79	$14,056,940.20	$31,740,116.99	$22,536,755.20	.....	$9,203,361.79
Total—General Fund	17,302,793.80	20,016,290.31	12,906,587.78	7,345,140.13	20,251,727.91	22,536,755.20	$2,285,027.29	.....
Total—Loan Funds	7,120,687.62	14,319,990.41	4,776,589.01	6,711,800.07	11,488,389.08	No estimate		
Recapitulation by Departments:								
Dept. of Mayor	489,906.16	2,167,603.14	353,661.20	184,853.40	538,514.60	556,175.00	17,660.40	.....
Office of the Mayor	98,408.21	1,750,483.14	82,222.93	38,130.03	120,352.96	98,720.00	.....	21,632.96
Free Library	264,985.36	282,920.00	188,770.74	94,512.26	283,283.00	302,455.00	19,172.00	.....
Philadelphia museums	66,383.35	66,200.00	43,488.89	24,711.11	68,200.00	77,000.00	8,800.00	.....
Various schools and museums	60,129.24	68,000.00	39,178.64	27,500.00	66,678.64	78,000.00	11,321.36	.....
Dept. of Supplies (itself)	60,015.81	63,680.00	39,890.71	24,389.29	64,280.00	68,280.00	4,000.00	.....
Civil Service Commission	61,566.31	62,750.00	42,034.35	26,333.41	68,367.76	78,530.00	10,162.24	.....
Dept. of Public Safety	8,365,370.43	8,610,257.92	5,826,997.87	2,843,729.99	8,670,727.86	9,099,739.74	429,011.88	.....
Director's Office	45,099.98	40,553.14	24,402.05	14,695.07	39,097.12	43,464.04	4,366.92	.....
Bureau of Police	4,457,025.39	4,573,148.54	3,394,039.54	1,218,493.22	4,612,532.76	4,673,245.50	60,712.74	.....
Bureau of Fire	1,557,207.63	1,811,007.57	1,034,987.88	776,019.69	1,811,007.57	1,863,669.00	52,661.43	.....
Bureau of Boiler Inspection	21,793.52	22,246.00	13,892.50	8,353.50	22,246.00	26,890.00	4,644.00	.....
Bureau of Building Inspection	83,924.10	84,109.00	56,254.13	29,391.87	85,646.00	145,304.00	59,658.00	.....

EXHIBIT 7.—*Concluded*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Bureau of Elevator Inspection	37,683.73	39,385.00	25,455.61	13,525.47	38,981.08	50,860.00	11,378.92	.....
Bureau of Correction	196,068.11	225,416.13	140,476.30	91,548.49	232,024.79	222,032.50	.....	9,992.29
Electrical Bureau	1,966,567.97	1,814,392.54	1,137,489.86	691,702.68	1,829,192.54	2,074,274.70	245,082.16	.....
Dept. of Health and Charities	2,391,585.90	3,035,462.30	1,678,488.83	1,432,259.65	3,110,748.48	2,885,790.00	.....	224,958.48
Director's Office.	92,012,39	100,730.00	58,259.82	29,399.40	87,659.22	30,330.00	.....	57,329.22
Bureau of Health	665,662.77	795,774.78	417,495.73	378,279.05	795,774.78	892,920.00	97,145.22	.....
Bureau of Charities	1,633,910.74	2,138,957.52	1,202,733.28	1,024,581.20	2,227,314.48	1,962,540.00	.....	264,774.48
Dept. of Public Works	11,924,299.42	17,838,080.51	9,090,366.77	8,156,668.26	17,247,035.03	9,038,212.46	.....	8,208,822.57
Director's Office .	117,510.09	68,779.62	47,512.71	19,957.63	67,470.34	71,475.00	4,004.66	.....
Bureau of Surveys	2,028,334.67	5,607,919.60	1,161,180.15	4,500,499.45	5,661,679.60	581,920.00	.....	5,079,759.60
Bureau of Highways	6,092,511.61	7,703,402.47	5,614,835.92	1,673,185.75	7,288,021.67	4,688,299.00	.....	2,599,722.67
Bureau of Water	2,461,154.52	2,788,346.67	1,455,311.83	1,526,101.13	2,981,412.96	2,488,906.66	.....	492,506.30
Bureau of Lighting	491,204.49	671,716.92	374,361.78	217,712.67	592,074.45	593,524.00	1,449.55	.....
Bureau of Gas...	9,516.00	10,000.00	4,839.14	2,447.92	7,287.06	10,800.00	3,512.94	.....
Bureau of City Property	724,068.04	987,915.23	432,325.24	216,763.71	649,088.95	603,287.80	.....	45,801.15
Art Jury	4,539.97	5,050.00	2,167.40	2,882.60	5,050.00	5,350.00	300.00	.....
Board of Recreation	206,386.80	281,483.38	92,636.02	175,789.30	268,425.32	250,068.00	.....	18,357.32
Dept. of Wharves, Docks and Ferries	805,309.20	2,004,383.47	423,609.71	1,075,828.23	1,499,437.94	247,180.00	.....	1,252,257.94
Dept. of City Transit	114,501.42	267,530.00	133,323.93	134,206.07	267,530.00	307,430.00	39,900.00	.....

EXHIBIT 8.—EXPENDITURES, ACTUAL AND ESTIMATED, BY ORGANIZATION UNITS, NOT UNDER THE MAYOR

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Grand total.....	$14,728,278.19	$15,450,458.12	$7,635,618.59	$8,172,397.07	$15,808,015.66	$15,539,398.51	.....	$268,617.15
Total—General Fund	12,807,366.02	14,160,252.92	7,071,572.16	7,006,243.80	14,077,815.96	14,204,118.51	$126,302.55	.....
Total—Loan Funds	1,920,912.17	1,290,205.20	564,046.43	1,166,153.27	1,730,199.70	1,335,280.00	.....	394,919.70
Recapitulation by Departments:								
Clerks of Councils.	135,464.38	138,164.40	82,089.99	56,074.41	138,164.40	107,579.00	.....	30,585.40
Department of City Controller	88,783.70	94,109.86	60,648.66	33,461.20	94,109.86	94,220.00	110.14	.....
Department of City Treasurer	10,171,976.72	9,662,741.65	4,678,267.39	5,666,477.76	10,344,745.15	10,110,788.51	.....	233,956.64
Board of Revision of Taxes	283,418.82	291,130.00	178,086.38	113,043.62	291,130.00	291,130.00	.....	.....
Department of Receiver of Taxes	290,676.89	297,405.50	204,943.07	100,214.41	305,157.48	324,630.00	19,472.52	.....
Department of Law	183,413.46	191,220.78	118,087.68	63,520.13	181,607.81	180,990.00	.....	617.81
Department of City Commissioners.	1,600,409.52	2,025,240.44	939,854.80	921,720.77	1,861,575.57	1,940,483.00	78,907.43	.....
Clerks of Courts, Oyer and Terminer and Quarter Sessions ...	68,131.64	95,425.00	56,280.83	39,144.17	95,425.00	112,900.00	17,475.00	.....

EXHIBIT 8.—*Concluded*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Prothonotary, Courts of Common Pleas.....	93,201.65	121,048.64	76,514.52	44,534.12	121,048.64	124,540.00	3,491.36	.....
Department of Coroner	66,984.00	67,045.00	44,989.27	23,135.73	68,125.00	72,735.00	4,610.00	.....
Department of Recorder of Deeds	264,919.68	285,778.26	192,990.45	92,787.81	285,778.26	264,940.00	.....	20,838.26
Department of Register of Wills..	84,021.08	92,845.45	60,414.34	32,431.11	92,845.45	98,615.00	5,769.55	.....
Department of District Attorney..	96,326.79	96,038.31	61,465.30	34,572.91	96,038.21	109,800.00	13,761.79	.....
Department of Sheriff	123,394.80	184,685.00	100,686.78	83,998.22	184,685.00	191,540.00	6,855.00	.....
Department of County Prisons	242,520.53	257,609.00	161,229.25	96,379.75	257,609.00	655,613.00	398,004.00	.....
Reed St. Prison .	117,479.01	132,682.00	83,959.59	48,722.41	132,682.00	229,484.00	96,802.00	.....
Convict Prison—Holmesburg ...	125,041.52	124,927.00	77,269.66	47,657.34	124,927.00	426,129.00	301,202.00	.....
Commissioners of Fairmount Park	907,734.53	1,522,920.83	592,689.83	770,231.00	1,362,920.83	831,845.00	.....	531,075.83
Commissioners of Sinking Fund..	26,900.00	27,050.00	26,380.05	669.95	27,050.00	27,050.00	.....	.....

EXHIBIT 9.—PUBLIC SERVICE PROGRAM.—EXPENDITURES, ACTUAL AND ESTIMATED, CLASSIFIED BY FUNCTIONS OR ACTIVITIES

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Grand Total.....	$24,423,481.42	$34,336,280.72	$17,683,176.79	$14,056,940.20	$31,740,116.99	$22,536,755.20	.....	.....	$9,203,361.79	28.9*
Total—General Fund	17,302,793.80	20,016,290.31	12,906,587.78	7,345,140.13	20,251,727.91	22,536,755.20	$2,285,027.29*	11.3*	.....	.....
Total—Loan Funds	7,120,687.62	14,319,990.41	4,776,589.01	6,711,800.07	11,488,389.08	No estimate	.....	.....	.....	.....
Recapitulation by Functions:										
Dept. of Mayor....	489,906.16	2,167,603.14	353,661.20	184,853.40	538,514.60	556,175.00	17,660.40*	3.3*	.....	.....
Office of the Mayor	98,408.21	1,750,483.14	82,222.93	38,130.03	120,352.96	98,720.00	.....	.....	21,632.96*	17.9*
Direction and control	60,835.07	1,716,263.14	52,184.39	29,723.34	81,907.73	63,500.00	.....	.....	18,407.73*	22.5*
Recording and reporting ...	37,573.14	34,220.00	30,038.54	8,406.69	38,445.23	35,220.00	.....	.....	3,225.23	8.4
Free Library	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Library	264,985.36	282,920.00	188,770.74	94,512.26	283,283.00	302,455.00	19,172.00	6.8	.....	.....
Philadelphia Museums	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Museums	66,383.35	66,200.00	43,488.89	24,711.11	68,200.00	77,000.00	8,800.00	12.9	.....	.....
Various schools and museums..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Educational and welfare co-operation	60,129.24	68,000.00	39,178.64	27,500.00	66,678.64	78,000.00	11,321.36	16.9	.....	.....

EXHIBIT 9.—*Continued*

Dept. of Supplies										
plies (itself) ...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Purchase of supplies and equipment for City Departments ..	60,015.81	63,680.00	39,890.71	24,389.29	64,280.00	68,280.00	4,000.00	6.2	.....	.....
Civil Service Commission	61,566.31	62,750.00	42,034.35	26,333.41	68,367.76	78,530.00	10,162.24	14.9	.....	.....
Executive	14,742.35	19,872.92	10,529.96	6,706.96	17,236.92	20,894.38	3,657.46	21.2	.....	.....
Examination of applicants	34,394.09	29,774.88	23,540.93	15,009.21	38,550.14	43,811.52	5,261.38	13.6	.....	.....
Preparation of lists and certification	12,429.87	13,102.20	7,963.46	4,617.24	12,580.70	13,824.10	1,243.40	9.9	.....	.....
Dept. of Public Safety	8,365,370.43	8,610,257.92	5,826,997.87	2,843,729.99	8,670,727.86	9,099,739.74	429,011.88*	4.9*	.....	.....
Director's Office .	45,099.98	40,553.14	24,402.05	14,695.07	39,097.12	43,464.04	4,366.92*	11.2*	.....	.....
Executive	43,118.36	38,508.14	23,288.05	13,764.07	37,052.12	41,219.04	4,166.92*	11.2*	.....	.....
Regulating and licensing employment agencies	1,981.62	2,045.00	1,114.00	931.00	2,045.00	2,245.00	200.00	9.8	.....	.....
Bureau of Police.	4,457,025.39	4,573,148.54	3,394,039.54	1,218,493 22	4,612,532.76	4,673,245.50	60,712.74*	1.3*	.....	.....
Executive	34,948.14	31,130.00	20,222.48	13,357.32	33,579.80	34,178.00	598.20	1.8	.....	.....
Care of buildings, grounds and equipment	107,045.39	109,065.25	106,059.04	10,461.50	116,520.54	116,205.00	.....	.....	315.54	.3
Safeguarding life and property	4,230,240.13	4,344,367.60	3,212,530.38	1,157,996.70	4,370,527.08	4,424,896.50	54,369.42*	1.2*	.....	.....

EXHIBIT 9.—*Continued*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Pursuit of criminals	56,637.63	61,994.87	36,881.70	26,662.66	63,544.36	68,975.00	5,430.64	8.5	.....	.....
Fire prevention	28,154.10	26,590.82	18,345.94	10,015.04	28,360.98	28,991.00	630.02	2.2	.....	.....
Bureau of Fire..	1,557,207.63	1,811,007.57	1,034,987.88	776,019.69	1,811,007.57	1,863,699.00	52,661.43*	2.9*	.....	.....
Executive	37,903.87	41,917.30	13,010.47	28,906.83	41,917.30	64,511.50	22,594.20*	53.9*	.....	.....
Accounting and reporting ...	6,866.23	9,150.10	5,372.98	3,777.12	9,150.10	8,663.00	.....	.....	487.10*	5.3*
Care of buildings and equipment	88,845.44	239,083.85	95,158.91	143,924.94	239,083.85	109,612.50	.....	.....	129,471.35*	54.2*
Fire fighting...	1,423,592.09	1,520,856.32	921,445.52	599,410.80	1,520,856.32	1,680,882.00	160,025.68*	10.5*	.....	.....
Bureau of Steam Engine and Boiler Inspection	21,793.52	22,246.00	13,892.50	8,353.50	22,246.00	26,890.00	4,644.00	20.9	.....	.....
Executive	8,290.18	8,716.00	5,149.91	3,566.09	8,716.00	10,756.00	2,040.00	23.4	.....	.....
Inspection	13,503.34	13,530.00	8,742.59	4,787.41	13,530.00	16,134.00	2,604.00	19.3	.....	.....
Bureau of Building Inspection	83,924.10	84,109.00	56,254.13	29,391.87	85,646.00	145,304.00	59,658.00	69.6	.....	.....
Executive	16,792.94	18,395.00	11,539.35	6,925.65	18,465.00	21,719.00	3,254.00	17.7	.....	.....
Examination of plans	10,015.51	10,639.00	7,064.30	3,591.70	10,656.00	12,275.00	1,619.00	15.2	.....	.....
Inspection of buildings	57,115.65	55,075.00	37,650.48	18,874.52	56,525.00	111,310.00	54,785.00	96.9	.....	.....

EXHIBIT 9.—*Continued*

Bureau of Elevator Inspection	37,683.73	39,385.00	25,455.61	13,525.47	38,981.08	50,860.00	11,878.92	30.5	.....	.....
Executive	15,757.36	15,765.00	10,365.52	5,365.48	15,731.00	16,880.00	1,149.00	7.3	.....	.....
Inspection	21,926.37	23,620.00	15,090.09	8,159.99	23,250.08	33,980.00	10,729.92	46.1	.....	.....
Bureau of Correction	196,068.11	225,416.13	140,476.30	91,548.49	232,024.79	222,032.50	.....	.....	9,992.29*	4.3*
Executive	6,995.73	6,873.70	4,559.86	2,299.84	6,859.70	6,492.50	.....	.....	367.20	5.4
Accounting and reporting ...	4,413.14	4,524.25	3,061.90	1,458.10	4,520.00	4,530.00	10.00	.2	.....	.....
Detention of petty offenders	184,659.24	214,018.18	132,854.54	87,790.55	220,645.09	211,010.00	.....	.....	9,635.09*	4.4*
Electrical Bureau	1,966,567.97	1,814,392.54	1,137,489.86	691,702.68	1,829,192.54	2,074,274.70	245,082.16*	13.4*	.....	.....
Executive	48,510.42	44,940.00	29,533.50	15,406.50	44,940.00	79,237.70	34,297.70	76.3	.....	.....
Electrical Inspection	16,377.82	12,577.00	8,563.00	4,014.00	12,577.00	16,266.50	3,689.50	29.4	.....	.....
Elevator service, City Hall	159,206.47	64,436.82	37,528.00	26,908.82	64,436.82	69,981.50	5,544.68*	8.6*	.....	.....
Fire alarm and telephone service	126,598.50	133,245.51	84,294.72	54,950.79	139,245.51	185,854.75	46,609.24*	33.5*	.....	.....
Heat, light and power service	135,573.93	129,549.95	78,676.00	50,873.95	129,549.95	114,319.25	.....	.....	15,230.70	11.8
Electrical illumination of public buildings and streets	1,370,475.65	1,272,524.48	807,117.64	467,406.84	1,274,524.48	1,414,527.00	140,002.52*	10.9*	.....	.....
Installation and care of telephone, telegraph and electric signal instruments .	26,798.44	36,231.99	20,488.00	17,643.99	38,131.99	56,622.00	18,490.01*	48.5*	.....	.....

EXHIBIT 9.—*Continued*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Construction and care of municipal overhead electric lines.....	34,837.75	34,642.00	20,191.00	16,351.00	36,542.00	41,062.00	4,520.00	12.4	.....	.....
Construction and care of municipal underground electric lines.	48,188.99	86,244.79	51,098.00	38,146.79	89,244.79	96,404.00	7,159.21*	8.*	.....	.....
Dept. of Health and Charities ...	2,391,585.90	3,035,462.30	1,678,488.83	1,432,259.65	3,110,748.48	2,885,790.00	.....	.....	224,958.48*	7.2*
Director's Office .	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Executive	92,012.39	100,730.00	58,259.82	29,399.40	87,659.22	30,330.00	.....	.....	57,329.22	65.4
Bureau of Health	665,662.77	795.774.78	417,495.73	378,279.05	795,774.78	892,920.00	97,145.22*	12.2*	.....	.....
Executive	20,825.53	20,080.00	14,169.11	5,910.89	20,080.00	36,080.00	16,000.00	79.7	.....	.....
Control and prevention of communicable diseases	130,512.05	143,500.00	96,361.34	47,138.66	143,500.00	159,720.00	16,220.00	11.3	.....	.....
Promotion of child hygiene	27,883.09	27,424.81	17,057.40	10,367.41	27,424.81	80,790.00	53,365.19*	194.9*	.....	.....
Recording of vital statistics	15,750.00	17,750.00	12,194.39	5,555.61	17,750.00	17,050.00	.....	.....	700.00	3.9

EXHIBIT 9.—*Continued*

Protection of food supplies	227,461.80	28,570.00	19,102.40	9,467.60	28,570.00	53,450.00	24,880.00	87.1	.....	.....
Bacteriological examinations, chemical analyses and manufacture of biological products	57,371.86	31,648.73	20,801.61	10,847.12	31,648.73	42,620.00	10,971.27*	34.7*	.....	.....
Isolation and care of contagious disease patients.	281,626.58	422,205.74	168,125.24	254,080.50	422,205.74	268,000.00	.....	.....	154,205.74*	36.5*
Collection of Health Department revenues and certification of odorless excavators	4,259.57	4,250.00	2,838.50	1,411,50	4,250.00	4,250.00	.....	.....	.....	.....
Sanitary inspection	86,953.90	87,065.50	57,860.92	29,204.58	87,065.50					
Control of tenement and common lodging houses	13,018.39	13,280.00	8,984.82	4,295.18	13,280.00		130,614.50*	130.2*	.....	.....
Sanitary inspection and control of housing conditions	.....	.....	.....	.....	.....	230,960.00				
Bureau of Charities	$1,633,910.74	$2,138,957.52	$1,202,733.28	$1,024,581.20	$2,227,314.48	$1,962,540.00	.....	.....	$264,774.48*	11.9*

EXHIBIT 9.—*Continued*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Executive	40,062.95	49,844.93	33,107.45	17,684.08	50,791.53	53,108.48	$2,316.95*	4.6*	.....	.....
Care of buildings and grounds	682,989.9(	872,884.99	435,414.21	467,149.20	902,563.41	602,948.25	.....	.....	299,615.16*	33.2*
Manufacturing.	14,936.25	19,448.92	12,702.82	7,299.85	20,002.67	19,995.24	.....	.....	7.43*	00.0*
Vehicular transportation	23,805.82	27,093.44	14,044.04	11,756.03	25,800.07	34,298.75	8,498.68*	32.9*	.....	.....
Production of food stuffs ..	28,906.77	26,012.67	15,661.83	11,450.84	27,112.67	29,272.67	2,160.00	7.9	.....	.....
Social service..	86,181.4(	257,371.70	162,673.33	148,698.37	311,371.70	298,361.50	.....	.....	13,010.20*	4.2*
Care of indigent in City institutions	133,980.05	158,831.11	89,036.61	66,816.47	155,853.08	164,782.23	8,928.15*	5.8*	.....	.....
Care of indigent sick.....	277,785.08	361,242.44	214,648.45	146,929.36	361,577.81	377,429.19	15,851.38*	4.4*	.....	.....
Care of insane.	345,262.46	366,227.32	225,444.54	146,797.00	372,241.54	382,343.69	10,102.15*	2.7*	.....	.....
Dept. of Public Works	11,924,299.42	17,838,080.51	9,090,366.77	8,156,668.26	7,247,035.03	9,038,212.46	.....	.....	8,208,822.57*	113.3*
Director's Office.	117,510.09	68,779.62	47,512.71	19,957.63	67,470.34	71,475.00	4,004.66*	5.9*	.....	.....
Executive	111,807.73	64,086.16	44,657.62	18,370.24	63,027.86	64,875.00	1,847.14	2.9	.....	.....
Preparation of comprehensive plans ...	5,702.36	4,693.46	2,855.09	1,587.39	4,442.48	6,600.00	2,157.52*	48.6*	.....	.....
Bureau of Surveys	2,028,334.67	5,607,919.60	1,161,180.15	4,500,499.45	5,661,679.60	581,920.00	.....	.....	5,079,759.60*	89.7*
Executive	31,332.45	33,698.11	21,383.93	13,674.18	35,058.11	41,180.00	6,121.89*	17.5*	.....	.....

EXHIBT 9.—*Continued*

Recording and plotting	19,958.84	22,935.00	14,126.19	8,808.81	22,935.00	26,515.00	3,580.00	15.6	.....	.....
Engineering and surveying ...	231,108.95	262,620.00	166,693.11	98,126.89	264,820.00	300,305.00	35,485.00*	13.4*	.....	.....
City planning..	15,255.17	15,848.78	8,974.54	7,074.24	16,048.78	18,050.00	2,001.22*	12.5*	.....	.....
Construction of sewers and inlets	911,740.52	1,656,088.74	571,467.33	1,134,621.41	1,706,088.74	131,850.00	.....	.....	1,574,238.74*	92.3*
Construction of bridges...	218,802.04	313,291.07	128,929.07	184,362.00	313,291.07	14,030.00	.....	.....	299,261.07*	95.5*
Testing materials	9,896.46	13,800.00	8,785.60	5,014.40	13,800.00	14,215.00	415.00	3.	.....	.....
Sewage disposal	45,454.76	42,885.32	19,450.63	23,334.69	42,885.32	35,775.00	.....	.....	7,110.32*	16.6*
Abolition of grade crossings	544,785.48	3,246,752.58	221,269.75	3,025,482.83	3,246,752.58	.....	.....	.....	3,246,752.58*	100.*
Bureau of Highways	6,092,511.61	7,703,402.47	5,614,835.92	1,673,185.75	7,288,021.67	4,688,299.00	.....	.....	2,599,722.67*	35.7*
Executive and engineering .	70,334.26	69,817.25	47,135.66	24,704.17	71,839.83	74,599.00	2,759.17	3.8	.....	.....
Accounting and reporting ...	17,638.99	19,700.00	12,863.37	6,566.67	19,430.04	19,900.00	469.96	2.4	.....	.....
Recording and plotting underground structures ...	10,506.30	14,080.00	7,141.93	4,701.67	11,843.60	14,330.00	2,486.40	20.9	.....	.....
Granting permits and licenses	1,824.19	4,200.00	2,681.45	1,400.00	4,081.45	4,200.00	118.55	2.9	.....	.....
Construction and care of highways, sewers and meadow banks	5,851,835.70	7,452,447.19	5,476,042.64	1,563,230.89	7,039,273.53	4,250,650.00	.....	.....	2,788,623.53*	39.6*

EXHIBIT 9.—*Continued*

General and Loan Funds	1913 Expenditures	1914 Apprppriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Care of bridges	138,556.87	139,827.01	66,239.85	71,982.35	138,222.20	308,120.00	169,897.80*	122.9*	.....	.....
Mosquito elimination and prevention ..	1,815.30	3,331.02	2,731.02	600.00	3,331.02	16,500.00	13,168.98*	395.3*	.....	.....
Bureau of Water	2,461,154.52	2,788,346.67	1,455,311.83	1,526,101.13	2,981,412.96	2,488,906.66	.....	.....	492,506.30*	16.6*
Executive	39,920.73	28,256.44	16,359.17	13,947.12	30,306.29	27,071.66	.....	.....	3,234.63*	10.7*
Accounting and reporting ...	21,204.15	23,000.00	10,256.94	12,743.06	23,000.00	26,150.00	3,150.00	13.7	.....	.....
Engineering and construction .	268,775.65	559,584.84	144,102.66	422,821.60	566,924.26	32,900.00	.....	.....	534,024.26*	94.2*
Care of buildings, structures, grounds and equipment	522,119.74	478,168.42	324,863.40	230,587.40	555,450.80	512,720.00	.....	.....	42,730.80*	7.7*
Pumping	949,638.06	987,574.24	518,816.28	478,757.96	997,574.24	1,034,420.00	36,845.76*	3.7*	.....	.....
Filtration	249,595.44	260,578.78	183,709.53	98,646.05	282,355.58	289,360.00	7,004.42*	2.5*	.....	.....
Distribution ...	307,240.53	361,783.95	204,106.80	230,794.99	434,901.79	474,785.00	39,883.21*	9.2*	.....	.....
Meter service..	41,550.52	16,300.00	9,046.46	8,253.54	17,300.00	19,000.00	1,700.00	9.8	.....	.....
Levying water revenue	61,109.70	73,100.00	44,050.59	29,549.41	73,600.00	72,500.00	.....	.....	1,100.00	1.5
Bureau of Lighting	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Furnishing streets and inspection of lighting	491,204.49	671,716.92	374,361.78	217,712.67	592,074.45	593,524.00	1,449.55*	2.*	.....	.....

EXHIBIT 9.—*Continued*

Bureau of Gas...	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Gas and gas meter inspection	9,516.00	10,000.00	4,839.14	2,447.92	7,287.06	10,800.00	3,512.94	48.2	.....	.....
Bureau of City Property	724,068.04	987,915.23	432,325.24	216,763.71	649,088.95	603,287.80	.....	.....	45,801.15*	7.*
Executive	131,000.00	131,568.33	118,675.26	14,495.27	133,170.53	132,810.00	.....	.....	360.53*	.2*
Planning and construction .	9,000.00	10,050.00	8,662.03	3,487.61	12,149.64	11,050.00	.....	.....	1,099.64*	1.*
Care of City buildings	233,449.25	415,303.18	139,793.26	105,759.97	245,553.23	227,247.80	.....	.....	18,305.43*	7.5*
Care of small parks and public squares	277,218.79	352,967.01	117,234.70	63,385.17	180,619.87	157,115.00	.....	.....	23,504.87*	13.*
Custody of miscellaneous real estate...	40,900.00	41,038.00	24,887.89	20,548.68	45,436.57	45,363.00	.....	.....	73.57*	.2*
Historical museum	32,500.00	36,988.71	23,072.10	9,087.01	32,159.11	29,702.00	.....	.....	2,457.11*	7.7*
Art Jury.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Passing upon works of art, structures, etc.	4,539.97	5,050.00	2,167.40	2,882.60	5,050.00	5,350.00	300.00	5.9	.....	.....
Board of Recreation	206,386.80	281,483.38	92,636.02	175,789.30	268,425.32	250,068.00	.....	.....	18,357.32*	6.8*
Executive	8,233.15	6,575.00	4,427.06	2,247.94	6,675.00	13,340.00	6,665.00	99.8	.....	.....
Care of playgrounds and baths	198,153.65	274,908.38	88,208.96	173,541.36	261,750.32	236,728.00	.....	.....	25,022.32*	9.6*
Dept. of Wharves, Docks and Ferries	805,309.20	2,004,383.47	423,609.71	1,075,828.23	1,499,437.94	247,180.00	.....	.....	1,252,257.94*	83.5*
Executive	38,930.50	43,605.30	25,660.96	14,910.49	40,571.45	44,855.00	4,283.55*	10.5*	.....	.....

EXHIBIT 9.—*Concluded*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures			
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase		Decrease	
							Amount	%	Amount	%
Care of construction of wharves, piers and bulkheads	683,365.00	1,858,086.87	321,920.57	1,031,004.62	1,352,925.19	92,835.00	.....	.....	1,260,090.19*	93.1*
Keeping harbor channel open and dredging	83,013.70	102,691.30	76,028.18	29,913.12	105,941.30	109,490.00	3,548.70*	3.4*	.....	.....
Dept. of City Transit	114,501.42	267,530.00	133,323.93	134,206.07	267,530.00	307,430.00	39,900.00	14.9	.....	.....
Executive	17,418.22	24,480.00	15,598.99	8,881.01	24,480.00	24,055.00	.....	.....	425.00	1.7
Accounting and reporting ...	8,280.35	18,850.00	8,972.73	9,877.27	18,850.00	18,125.00	.....	.....	725.00	3.8
Engineering ...	88,802.85	224,200.00	108,752.21	115,447.79	224,200.00	265,250.00	41,050.00	18.3	.....	.....

* Increase or decrease as shown is due to the fact that no estimate has been made for possible 1915 Loan Fund requirements.

* Increase or decrease as shown is due to the fact that no estimate has been made for possible 1915 Loan Fund requirements.

EXHIBIT 10.—"CONTRACTING AND PURCHASING REQUIREMENTS."—EXPENDITURES, ACTUAL AND ESTIMATED, CLASSIFIED TO SHOW AMOUNTS OF THINGS BOUGHT AND OBLIGATIONS MET; ALSO RECAPITULATION BY CHARACTER OF USE

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Grand total	$39,151,759.61	$49,786,738.84	$25,318,795.38	$22,229,337.27	$47,548,132.65	$38,076,153.71	.....	$9,471,978.94*
Total—Departments Under the Mayor	24,423,481.42	34,336,280.72	17,683,176.79	14,056,940.20	31,740,116.99	22,536,755.20	.....	9,203,361.79*
Total—Departments Not Under the Mayor.	14,728,278.19	15,450,458.12	7,635,618.59	8,172,397.07	15,808,015.66	15,539,398.51	.....	268,617.15
Recapitulation by Objects of Expenditures:								
Personal service	13,142,693.45	13,690,562.67	9,208,017.73	4,740,912.08	13,948,929.81	15,694,908.00	$1,745,978.19	.....
Services other than personal	5,716,168.09	6,674,859.12	4,013,465.80	2,415,832.70	6,429,298.50	6,270,334.12	.....	158,964.38*
Materials	596,284.41	482,889.17	243,669.22	282,272.67	525,941.89	789,301.24	263,359.35	.....
Supplies	2,458,363.57	2,668,580.87	1,499,374.86	1,225,899.89	2,725,274.75	2,805,731.02	80,456.27	.....
Equipment and parts	758,443.26	1,126,546.85	406,049.64	666,041.98	1,072,091.62	712,777.62	.....	359,314.00*
Structures and nonstructural improvements	6,590,083.87	14,446,330.02	5,092,279.92	6,929,536.95	12,021,816.87	1,757,806.00	.....	10,264,010.87*
Land	488,964.17	697,159.78	89,794.52	604,838.23	694,632.75	7,000.00	.....	687,632.75*
Capital outlays for rights and obligations and payment of dept.	4,236,761.88	4,350,991.28	1,718,883.47	2,649,367.13	4,368,250.60	4,080,243.26	.....	288,007.34*

EXHIBIT 10.—*Concluded*

General and Loan Funds	1913 Expenditures	1914 Appropriations	1914 Expenditures and Requirements			1915 Request	Comparison of 1915 Request with 1914 Expenditures	
			Actual to Sept. 1	Estimated Sept. 1 to Dec. 31	Total		Increase	Decrease
Fixed charges and contributions other than pensions and retirement salaries..	4,962,986.88	5,463,648.78	2,966,519.59	2,605,758.21	5,572,277.80	5,726,552.45	154,274.65	.....
Pensions and retirement salaries..	162,558.24	158,417.06	68,188.00	94,119.34	162,307.34	185,000.00	22,692.66	.....
Contingencies	12,200.17	1,192.74	565.28	627.46	1,192.74	.....	.....	1,192.74
Payments arising from the relation of agents.	26,251.62	25,560.50	11,987.35	14,130.63	26,117.98	46,500.00	20,382.02	.....
Recapitulation by Character of Expenditures:								
Administration ...	2,258,594.64	2,412,952.67	1,520,098.00	884,711.21	2,404,809.21	2,489,818.50	85,009.29	.....
Operation	16,374,835.35	17,975,151.15	11,246,112.17	6,539,790.42	17,785,902.59	19,090,976.96	1,305,074.37	.....
Maintenance	3,612,662.78	3,558,114.17	2,395,152.91	1,441,588.56	3,836,741.47	4,391,291.04	554,549.57	.....
Debt service.....	8,498,451.28	9,022,701.74	4,154,331.20	4,845,283.76	8,999,614.96	8,865,313.51	.....	134,301.45
Other expense.....	721,762.30	888,273.83	525,460.76	416,812.39	942,273.15	1,164,437.20	222,164.05	.....
Capital outlay	7,685,453.26	15,929,545.28	5,477,640.34	8,101,150.93	13,578,791.27	2,074,316.50	.....	11,504,474.77*

* Decrease as shown is due to various Departments having made no estimate for possible 1915 Loan Fund requirements.

CONSTITUTIONAL PROVISION FOR A BUDGET [1]

CHARLES D. NORTON

Vice-President, First National Bank, New York

TO regard government as a business enterprise merely, would be a narrow and illiberal view, for the activities of government are undertaken, not for purposes of profit, but to enhance the safety and the welfare of citizens. It is for the voters or their representatives to decide what activities government shall undertake. Once the government has embarked upon any definite enterprise, however, a question fairly arises as to the merits of the administration, and for the purpose of examining results and measuring efficiency of administration, it is proper to consider that a constitutional government is a corporation organized to carry on public business. The managers of a public corporation have much the same kind of business problems as the managers of private corporations. They must make plans and provide the means of carrying them out. Public officers are hampered, however, by constitutional and charter restrictions which make it difficult, if not impossible, for them to execute their plans as efficiently as do the managers of private business.

When the president of a large business corporation goes before the annual meeting of his stockholders or directors, he makes a statement of the assets, the liabilities, the surplus and the profits of the year. The figures are so displayed that they tell their own story and show the results of the year's operations. He states what his plans are for the next year's work; whether he wishes to expand or contract the business; what he wishes to spend in permanent improvements; what new capital he needs, and how he proposes to raise it. He is ready to answer questions and to explain his plans and policies. That

[1] Discussion at the meeting of the Academy of Political Science, November 19, 1914.

statement is his "budget." If approved, it becomes his program for next year's work.

If the natural businesslike relation which exists between the head of a private business and his directors and stockholders can be created between the governor and the legislature, and if this relation can be defined in the constitution of the state, a budget system will certainly be the logical outcome. At the present time our federal, state and municipal charters and constitutions have surrounded government executives with fantastic regulations which, if applied in private business, would certainly wreck any enterprise dependent for its existence on yearly profits.

Of all the propositions made by Dr. Cleveland none is more important than this—that the making of a budget is essentially an executive function. The oldest standing order of the House of Commons, dated July 1713, is:

"The House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue unless recommended by the Crown."

That order is the foundation of efficiency in the English public service; upon that foundation a budget system is firmly placed. The House of Commons demands and secures a budget which is a clear, understandable, well-indexed document, and the representatives of the Crown who make the budget appear in person before the House to explain it. The House of Commons, like the board of directors of a well-conducted private English business corporation, controls the purse, but has deprived itself of the privilege of dipping into it.

Our difficulty is that, as a general rule, the man at the top —president, governor, or mayor—is not entrusted with sole authority to formulate and to amend the financial program of the year; he and his assistants are not permitted to appear in person to explain and to defend his program; so that he cannot be held personally responsible for good or bad results.

Congress, legislatures, city councils, exceed their proper function with respect to finance, which is to vote or to refuse

to vote public moneys for the estimates submitted by the responsible executive. As a rule, they reserve to themselves the power to introduce appropriation bills without first securing executive approval. These appropriation bills are divided up into sections quite arbitrarily for hasty consideration among many sub-committees, who work without coördination with each other. "Log-rolling," "riders," "pork barrels," and immense public expenditures are the logical and inevitable result in our public business. What private corporation could survive such procedure on the part of its directors? What man of ability and character would retain the presidency of a private business corporation in the face of such dangerous practice on the part of his directors?

Guardians of the treasury, possessors of the power to levy taxes, our legislators—national, state, and municipal—fritter away their proper and supreme control of the executive. By meddling with his authority they release him from personal responsibility for public expenditures. They sell their birthright for a mess of pottage. What they gain is the right to "log-roll" or get "pork" for constituents; what they lose is responsible and efficient government.

Periodically, the growing uneasiness of taxpayers culminates in an angry protest. We seem to have reached such a period of protest at this time. The European war, with its waste and losses; the diminished profits of trade; unemployment; the creation of new forms of taxation; the arbitrary attitude of certain public commissions; the astounding recent growth of public debt, have brought a sense of uneasiness if not of positive alarm to taxpayers and to investors. The debt of New York state as shown by census reports is typical. Deducting sinking-fund assets, it grew from $8,540,427, or 99 cents per capita, in 1907, to $86,205,247, or $9.05 per capita, in 1912—that is, it multiplied ten times in five years, and has since risen to $124,772,980, which is fifteen times as much debt in 1914 as in 1907. Taxes and debt have everywhere risen together. The feeling grows that our government agencies are going too fast and too far; that they are not organized in a way to do their work efficiently; that they have not the means of locating and removing inefficiency.

There is no permanent improvement except along the well-trodden path which the rest of the civilized world has followed. We learned this lesson in the reform of our currency and banking laws. The studies of the Monetary Commission convinced men of all parties that Europe had much to teach us in the reform of our banking and currency system. The studies of President Taft's Commission on Economy and Efficiency lead to the same conclusion concerning our public finance. Our power to govern ourselves efficiently has been taken from us and it must be restored by correcting the faulty organic law which controls our government finance.

We must introduce into the charters and constitutions which control our government procedure the sound principles and practices which make private business effective the world over.

THE ORGANIZATION AND PROCEDURE OF THE COURTS[1]

HENRY W. JESSUP

THE remarks of the President of the United States before the American Bar Association in Washington in October last were not so much an original statement as they were the summation of a criticism of the administration of justice in our courts which has been made in one form or another for many years, namely, that the justice administered in a court is not identical with that justice which the innate sense of justice in every human breast by intuition conceives to be applicable to the particular dispute.

The President repeated his conversation with a lawyer on the rational validity of precedents in the administration of justice, which he closed by asking, "After all, isn't our object justice?" And the lawyer replied, "God forbid. We should be very much confused if we made that our standard. Our standard is to find out what the rule has been and how the rule that has been applies to the case that is."

Mr. Justice Crane of the supreme court of this state, in his remarks before the Phi Delta Phi Club of New York, before this meeting of the bar association in Washington, had stated this paradox in substantially identical form. It has been recognized from the beginning of the development of our law. Doctor John Norton Pomeroy in examining the origin of equity jurisprudence and showing the arbitrariness and formalism of the original five actions that constituted enforcement of civil rights in the earliest period of Roman law, quotes from the *Institutes:* "All these actions of the law fell gradually into great discredit, because the over-subtlety of the ancient jurists made the slightest error fatal." Going on later to emphasize the importance of a correct notion of equity, which he says is

[1] Read at the meeting of the Academy of Political Science, November 19, 1914.

not a theoretica[1] but a very practical inquiry, he observes: "If a certain theory of its nature which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights." These observations, I may note, were made in 1881. And this conception to which he refers, he says, was known to the Roman jurists, and was described by the phrase, *arbitrium boni viri*, which he translates, "the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle." He closes by observing: "It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost."

This leads me to observe by way of preface that it is the function of conferences such as this, and of deliberations of associations of the bar everywhere to try to re-solve this paradox and approximate the administration of justice in the particular case in a court of justice to that *arbitrium boni viri*, or intuition of the right thing that is exercised by the man of intelligence and conscience. Are red-tape and meticulous technicalities, elaborate codes and conflicting jurisdictions, aids to that approximation?

When men of common sense are considering the question of the performance of duty by their courts of justice it is highly reasonable to assume that they will apply to that inquiry and discussion every common-sense idea or test that is available. During the last twenty years a great stride forward has been made in respect to increased efficiency in every line of practical endeavor, so that we have to-day what are known as "efficiency experts." Economy of effort, economy of fuel, standardization of parts and function, the diminution of the intermediate cogs in the machine, the more direct application of power to the propeller—in other words, the elimination of friction and waste—is the object of the efficiency expert. Every one of these ideas may be applied to any institution, even to the courts of justice. They are sacred, in a sense, whether you call it a historic sense,

or a constitutional sense, but there is no reason why, when the time comes for a discussion of whether or not changes shall be made, the most practical tests should not be applied in this very respect of efficiency which is now a determining factor in forming an estimate of the effectual operation of any enterprise or business or system. Therefore, if we should re-state the inquiry with regard to the administration of justice in practical terms, we should ask to see if the result desired is secured without friction or waste,—and the word "waste" includes waste of time, waste of energy, waste of material. The answer to that inquiry can only be negative.

There is a great waste of power. The energies of judges of learning and ability are frittered away by irritating and vexatiously long-drawn-out procedural applications which involve *how*, and not *what*. They are adjective, not substantive. The agitation and litigation of such matters merely defers, delays or complicates the determination by a court of justice of the issues of fact between the two particular litigants. This involves, of course, a waste of time, and when it comes to the determination of questions of fact or of law and the actual trial of a case, a justice of our supreme court of New York county may enter the trial of that case on Monday after having been a week or more in special term part I with a calendar of from ninety to one hundred practice motions *per diem* to be dealt with before him, many of which still remain undisposed of and perhaps are seething in his mind.

Then we have too many cogs in our judicial machine; that is to say, we have too many courts—courts of general, of special, and of limited jurisdiction. A litigant can go just so far in one of these courts in which he is advised to bring his particular proceeding; then, after several years of litigation, he perhaps finds that there is still something to be done in another court before the result can be duly achieved in the court he began in, or that he has lost his remedy because he proceeded in the wrong court. Not to mention our federal courts, we have in New York our supreme court, with its appellate branches, and our court of appeals. We have our city courts and our county courts. We have our surrogates' courts and

our municipal courts. We have our magistrates' courts and our courts of general and special sessions and the criminal branch of the supreme court. Disregarding absolutely and for the purposes of this discussion what gave rise to their organization or the purpose of the constitutional embodiment of any or all of these courts, we ask, Is there any valid reason why they should be continued with this sometimes conflicting, often overlapping or concurring jurisdiction, and with such remedial inequality? Is the average litigant so benefited as that any valid objection could be raised to their elimination and to the standardization of our whole judicial system by taking these courts up into the supreme court, making it a general court of jurisdiction at law and in equity, with power to grant every remedy that is applicable to the facts as proved in the particular case before it? That is, approximating the English system, could not the various particular kinds of work that have been specialized in these special courts be committed to the administrative divisions of the supreme court so that we might have a probate division, by which the work now done by the surrogate might be done, and an equity division, a tort, contract and commercial-law division, and so on, a system regulated by rules of the appellate division in each department, and hence elastic and adjustable to the volume of business at any particular time? The erroneous assignment of a cause to a wrong division should not be jurisdictionally defective, but on discovery, the cause should be transferable to the particular division without loss of priority or position. The Committee of Seven of the Phi Delta Phi Club of the city of New York, which has for months been engaged in the examination of this question, has made a report which has been privately published and which embodies a recommendation of this character in the form of suggested amendments to the judiciary article of the constitution.[1] In the particular we are now discussing, this report makes certain suggestions, drastic as we supposed. The only criticism so far received from members of the bar who have examined them is

[1] A copy of part II of the report recommending these changes is appended to this paper as an exhibit for the information of such as may desire to study the matter further.

that they are too conservative. The report deals with the propriety of yielding, for the time being (so that the change will not be too abrupt), to the feeling that there should be a "poor man's court," that is, a court available by locality of exercise of jurisdiction to everybody. In the ordinary county of this state the county court is such a court. The county seat is the mecca of the surrounding inhabitants. In great cities like the city of New York the municipal court has been this "poor man's court." Therefore, the report suggests that accompanying the standardization of the supreme court by taking up into it the city and surrogates' courts, there be preserved the system of county or neighborhood courts which in turn shall be standardized by taking up into them in appropriate parts of the state these municipal courts and making them divisions of the county court at the particular places where more than one part is required to do the business. That is to say, we should have two courts: the neighborhood court, limited in the pecuniary extent of the judgment it could award to either party but within that pecuniary limit having broad and general powers to do justice or equity between the parties, and then the supreme court, unlimited in any respect as to its jurisdiction. Of course the court of appeals would remain the court of last resort.

The second feature of the report is that the results desired from such a standardization are not going to be secured if we are still to have waste of energy and time. This waste of energy and time arises out of that which unduly engrosses our courts, *i. e.*, our highly meticulous and highly articulated code of civil procedure.

For the purpose of discussion before the constitutional convention the reports that have been made by national committees, such as that of the National Economic League or the American Bar Association, which deal with uniform legislation, and with short practice acts in all the states, need not be referred to, because they are within the province and power of the legislature, and do not require constitutional embodiment or direction or authority. We believe that the movement for uniform legislation which has already found acceptance in respect to negotiable-instruments or bills-of-lading laws and the like,

and which, we trust, will extend to the laws of marriage and divorce, and to every other feature of our ordinary law, is bound to come. We believe also that even the state of New York will yield to the influences that demand a short practice act, so that procedure will be relieved from the hard-and-fast and highly technical channels of a code, and will be left more and more to the control of an elastic and adaptable scheme of rules of court—in the formulation of which, however, it may be suggested in passing, the bar should have a voice equally with the bench. And so the report of the Committee of Seven suggests that an additional idea be adopted from the English system; *i. e.*, a constitutional provision authorizing the appointment by the appellate divisions of the different departments where this waste of effort and energy is going on, of commissioners, or supreme court masters, to whom all procedural and interlocutory matters should be assigned by some system of rotation, so as to equalize their work. That is, as soon as a cause is at issue it should be sent *pro forma* to a master. And before him, on his summons for direction, the parties and their counsel should appear and at an informal hearing—at which, however, their testimony could be taken on oath—he should determine all questions as to the forms of pleadings, as to bills of particulars, as to injunctions or receiverships, and should boil the case down by eliminating sham or frivolous or dilatory issues, and frame an issue which thereupon would go to a justice of the supreme court who would try that issue so boiled down and relieved of all interlocutory red-tape.

To engraft such a scheme of relief upon our judicial system requires constitutional amendment, not as a matter of law, we believe, but as a matter of fact, for the following reason. This same scheme was suggested by the Commission on the Law's Delays, one of our ablest commissions, appointed pursuant to chapter 485 of the Laws of 1902. The legislature enacted a bill to carry their recommendations into effect, but it was vetoed by the governor on the opinion of the then attorney-general that it was unconstitutional. The impression at the time was that it was desired to veto the bill because it would affect disastrously the distribution of patronage in the appoint-

ment of referees, to whom part of this work of relieving the bench is now committed. In respect to references to hear and determine issues which present questions so complicated that they would unduly preëmpt the time of the court in the trial of the causes of other litigants, there is no question that the appointment of masters and commissioners would, by simplifying the issues to be tried, gradually result in destroying the referee system. The result, as many justices of the supreme court have admitted to the speaker, would be to relieve them from the intolerable pressure of applicants for patronage, a pressure which dates back many, many years. The Honorable Noah Davis, who was a presiding justice in the supreme court in this department for many years, told me, after his retirement from the bench, that I could have no conception how many or how reputable were the men who from time to time had come to him and besought him to give them a reference to compute to carry their families over Sunday. That is the least intolerable form of the pressure, personal or political, that is exerted upon the incumbent of judicial office.

The third material suggestion that grows out of this effort to eliminate this procedural work from the domain of the justice on the bench is addressed to a more debatable point. One of the most remarkable results of the convention that adopted the constitution as it now stands was the limitation on the powers of the court of appeals, the elimination from their consideration of questions of fact and the precluding of their review of certain unanimous decisions of the appellate division. If there is any reason in the world for the mediation of the appellate term and the appellate division between the determination of the judges of the supreme court and the determination of a court of last resort, it is not founded on essential justice. A county judge may try a man for a felony, and appeal from his determination goes directly to the court of appeals. If a man's life requires no intermediation of subordinate appellate courts for his protection, why should his pocket? The old general term, it is true, succeeded by the appellate division, has been composed almost without exception of men who have commanded the respect of the bar for their energy, their ability

their learning, and their earnest attempt to facilitate the business of the court. And yet, from the standpoint of the litigants, it is hard to explain why the court of last resort should, when it comes to determining finally the controversy, be precluded from going into the case in all its aspects of fact and of law. Take the rule of the preclusive effect of unanimity of the appellate division in certain cases. That unanimity may not be, after all, entire. It may have been a unanimous determination to reverse the justice before whom the parties and their witnesses appeared, and who had the consequently increased opportunity of forming a correct judgment on the facts. At least in respect to such cases there has not been unanimity of judicial determination in that particular case, and therefore the committee has suggested that this matter be reconsidered, and that where there is no unanimity of both trial and intermediate appellate court, the appellant should be entitled to a careful scrutiny of the whole record in all its aspects by the court of last resort.

The reason for limiting the jurisdiction of the court of appeals at the last constitutional convention was because it was so far behind in its work that even the erection of a second division of that court had not sufficed to clear up its calendar. The organization of the appellate division was a scheme to reduce the demands upon the time and energy of the court of last resort. In that particular respect it has been successful. Therefore the Committee of Seven had to consider the effect of its recommendation in this regard, and it came to the conclusion that it would be wise to eliminate, except in rare instances, all procedural, interlocutory matters from the consideration of the justices in the first instance. In this way, arguing from the operation of the practice in England, it is believed that the large percentage of appeals which fill our law reports and which involve the adjective law as distinct from the substantive law would inevitably be materially reduced, if not eliminated wholly, that the work of the appellate courts would thereby be lessened, and that there would then be no valid reason why the court of last resort should be relieved in any respect or in any degree of the labor of considering the whole case in all its aspects, and of rendering in its final judgment a determination, nor be absolved

by reason of any lack of power to do this or to do that under the law as it stands. If in any system of administering justice we desire to secure that approximation referred to by the words *arbitrium boni viri*, or if we wish to secure general just results under the law as it has been as applicable to the case as it is, it is essential that the litigants who appeal to these courts of justice should be satisfied that they have had a square deal. It is obvious that the time allotted to this paper does not permit of any extended discussion of the detailed working-out of these three main recommendations. They are shown by the annexed exhibit and they are being thoroughly studied and criticized by committees of the County Lawyers' Association, the New York City Bar Association and the State Bar Association, and by individual lawyers and judges throughout the state.

I close with the recommendation that in respect to all of the proposed topics for the consideration of this approaching convention the same practice be followed that the Committee of Seven has adopted, *i. e.*, the practice of stating in black and white and by italics and parentheses, where there are already constitutional provisions dealing with the topic to be considered, the exact nature of the change or development desired, whether it be the repeal or the new enactment advocated in behalf of ballot reform or suffrage or municipal home rule or referendum or franchises or taxation or any other question. If the proposition which you advocate is formulated in the words which you desire to write into the constitution, then everybody can tell what it is desired to accomplish, and the colored individual in the verbal woodpile, if there be one, is sure to be detected. There is nothing that so crystallizes one's own thought and conviction as the attempt to put it in appropriate words. "Great is the power of statement."

APPENDIX TO MR. JESSUP'S PAPER.

Report to the PHI DELTA PHI CLUB of New York City, by the Committee of Seven appointed to consider and recommend possible amendments to the Judiciary Article of the Constitution of the State of New York:

PART II

We recommend, accordingly, that the Sections of the Judiciary Article be amended as below, by inserting the new matter indicated by italics, and by eliminating the present text when the words are bracketed thus [ ].

§ 1. SUPREME COURT; HOW CONSTITUTED; JUDICIAL DISTRICTS.

The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article. The existing judicial districts of the State are continued until changed as hereinafter provided. The Supreme Court shall consist of the Justices now in office, and of the Judges *and Surrogates* transferred thereto by the fifth section of this article, all of whom shall continue to be Justices of the Supreme Court during their respective terms, [and of twelve additional Justices who shall reside in and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts; and of their successors.] The successors of said Justices shall be chosen by the electors of their respective judicial district. The Legislature may alter the judicial districts once after every enumeration under the Constitution, of the inhabitants of the State, and thereupon reapportion the Justices to be thereafter elected in the districts so altered. The Legislature may from time to time increase the number of justices in any judicial district except that the number of justices in the first and second district or in any of the districts into which the second district may be divided, shall not be increased to exceed one justice for each eighty thousand, or fraction over forty thousand of the population thereof, as shown by the last State, or Federal census or enumeration, and except that the number of justices in any other district shall not be increased to exceed one justice for each sixty thousand or fraction over thirty-five thousand of the population thereof as shown by the last State or Federal census or enumeration. [The Legislature may erect out of the second judicial district as now constituted, another judicial district and apportion the justices in office between the districts, and provide for the election of

additional justices in the new district not exceeding the limit herein provided.]

Const. 1846, art. VI, § 6, amended in 1905.

§ 2. JUDICIAL DEPARTMENTS; APPELLATE DIVISION; HOW CONSTITUTED; GOVERNOR TO DESIGNATE JUSTICES; REPORTER; TIME AND PLACE OF HOLDING COURTS. *Supreme Court Commissioners.*

The Legislature shall divide the State into four judicial departments. The first department shall consist of the counties of New York *and of the Bronx;* the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the Legislature may alter the judicial departments, but without increasing the number thereof.

There shall be an Appellate Division of the Supreme Court, consisting of seven Justices in the first department, and of five Justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five Justices shall sit in any case.

From all the Justices elected to the Supreme Court the Governor shall designate those who shall constitute the Appellate Division in each department; and he shall designate the Presiding Justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other Justices shall be designated for terms of five years or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the Justices so designated to sit in the Appellate Division, in each department, shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any Justice in the Appellate Division, or in case the Presiding Justice of any Appellate Division shall certify to him that one or more additional Justices are needed for the speedy disposition of the business before it. Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the Presiding Justices of the several departments at a meeting called by the Presiding Justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination. No Justice of the Appellate Division shall, within the department to which he may be designated to perform the duties of an Appellate Justice, exercise any of the powers of a Justice of the Supreme Court, other than those of a Justice out of court, and those pertaining to the Appellate Division, or to the hearing and decision of motions submitted by consent of counsel, but any such Justice, when not actually engaged in performing the duties of such

Appellate Justice in the department to which he is designated, may hold any term of the Supreme Court and exercise any of the powers of a Justice of the Supreme Court in any county or judicial district in any other department of the State. From and after the last day of December, *nineteen hundred fifteen* [eighteen hundred and ninety-five], the Appellate Division shall have the jurisdiction now exercised by *it* [the Supreme Court at its General Terms and by the General Terms of the Court of Common Pleas for the City and County of New York, the Superior Court of the City of New York, the Superior Court of Buffalo and the City of Brooklyn], and such additional jurisdiction as may be conferred by the Legislature. It shall have power to appoint and remove a reporter.

The Justices of the Appellate Division in each department shall have power to fix the times and places for holding Special Terms therein, and to assign the Justices in the departments to hold such terms; or to make rules therefor.

They shall also have power to provide by appropriate rules for Divisions of the Court at Trial and Special Terms, such as Probate Division, Equity Division, etc., and to prescribe the number of justices in each department to be assigned to such several Divisions, and to revoke, or alter, such rules as necessity may require.

They shall also have power to appoint Supreme Court Commissioners or Masters, in such numbers in each department as the Legislature may provide, but not exceeding one for each thousand of population in the department, to exercise the powers and perform the duties defined in § 6 below, or which the Legislature may prescribe.

Const. 1846, art. VI, §§ 7 and 28, added in 1882, amended in 1905.

§ 3. JUDGE OR JUSTICE *when* NOT TO SIT IN REVIEW; TESTIMONY IN EQUITY CASES.

No Judge or Justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. *Any Justice of the Supreme Court, except as otherwise provided in this article, may hold court in any county* (transferred from § 6).

Const. 1846, art. VI, § 8.

§ 4. TERMS OF OFFICE; VACANCIES, HOW FILLED.

The official terms of the Justices of the Supreme Court shall be

fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than by expiration of term in the office of Justice of the Supreme Court the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs; and, until the vacancy shall be so filled, the Governor by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

Const. 1846, art. VI, §§ 9, 13.

§ 5. *New York* CITY COURT[S *and the Surrogates' Courts* ABOLISHED; JUDGES BECOME JUSTICES OF SUPREME COURT; SALARIES; JURISDICTION VESTED IN SUPREME COURT.

[The Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Superior Court of Buffalo, and the City Court of Brooklyn.] *The City Court of the City of New York, and the Surrogate's Court in every County* are abolished from and after the first day of January, one thousand *nine* [eight] hundred [and] *sixteen* [ninety-six], and thereupon the seals, records, papers and documents of or belonging to such courts, shall be deposited in the offices of the Clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination. The Judges *and Surrogates* of said courts in office on the first day of January, one thousand *nine* [eight] hundred [and] *sixteen* [ninety-six], shall, for the remainder of the term for which they were elected or appointed, be Justices of the Supreme Court; but they shall sit only in the counties in which they were elected or appointed. *But this shall not apply to those Counties where the County Judges are also Surrogates. In such counties the County Judge shall no longer act as Surrogate after the first day of January, 1916, but his office and term as County Judge shall not be hereby otherwise affected. In respect to such counties the Legislature may provide for an additional Justice of the Supreme Court if the business heretofore done by the existing Surrogate's Court require it.*

The Legislature shall prescribe the time and manner of transfer of the clerks of the Surrogates' Courts and offices throughout the State that they may be available for the business of the Probate Division of the Supreme Court if and when provided for by the appropriate Appellate Division under § 2 hereof. Their salaries shall be paid by the said counties respectively, and shall be the same as the salaries of the other Justices of the Supreme Court residing in the same counties.

Their successors shall be elected as Justices of the Supreme Court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several courts hereby abolished, shall be vested in the Supreme Court. [Appeals from inferior and local courts now heard in the Court of Common Pleas for the City and County of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such Justice or Justices as the Appellate Divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the Legislature.]

New.

§ 6. *Supreme Court commissioners or masters.* [CIRCUIT COURTS AND COURTS OF OYER AND TERMINER ABOLISHED.]

From and after July 1st, 1916, in any judicial department of the State, where, in the judgment of the Justices of the Appellate Division, or of a majority thereof, the volume of business demands it, there may be appointed by such Appellate Division Masters, or Supreme Court Commissioners, who shall be members of the bar, of at least years' standing, who shall exercise in respect to interlocutory and procedural matters in any litigation pending in such department, including the direction of summary judgments, such powers and functions and who shall receive such compensation as the Legislature may prescribe; but the Legislature may commit to each Appellate Division the power to prescribe such power and functions, and the manner of their exercise, by rules, which such Appellate Division may from time to time amend or revoke.

In respect to matters which may be thus committed to Masters thus appointed, their orders shall be final until reversed in the manner to be prescribed by law.

The compensation and allowances of such Commissioners shall be provided for and paid as are the salaries of Supreme Court Justices.

[Circuit Courts and Courts of Oyer and Terminer are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All their jurisdiction shall thereupon be vested in the Supreme Court, and all actions and proceedings then pending in such courts shall be transferred to the Supreme Court for hearing and determination.]

New.

§ 7. COURT OF APPEALS.

The Court of Appeals is continued. It shall consist of the Chief Judge and Associate Judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the State. The official terms

of the Chief Judge and Associate Judge shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk and attendants. Whenever and as often as a majority of the Judges of the Court of Appeals shall certify to the Governor that said court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the Governor shall designate not more than four Justices of the Supreme Court to serve as Associate Judges of Court of Appeals. The Justices so designated shall be relieved from their duties as Justices of the Supreme Court and shall serve as Associate Judges of the Court of Appeals until the causes undisposed of in said court are reduced to two hundred, when they shall return to the Supreme Court. The Governor may designate Justices of the Supreme Court to fill vacancies. No Justice shall serve as Associate Judge of the Court of Appeals except while holding the office of Justice of the Supreme Court, and no more than seven Judges shall sit in any case. [As amended in 1899.]

Const. 1846, art. VI, § 3, amended in 1869.

§ 8. Vacancy in Court of Appeals, how filled.

When a vacancy shall occur otherwise than by expiration of term, in the office of Chief or Associate Judge of the Court of Appeals, the same shall be filled, for a full term, at the next general election happening not less than three months after such vacancy occurs; and until the vacancy shall be so filled, the Governor, by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor may fill such vacancy by appointment. If any such appointment of Chief Judge shall be made from among the Associate Judges, a temporary appointment of Associate Judge shall be made in like manner; but in such case, the person appointed Chief Judge shall not be deemed to vacate his office of Associate Judge any longer than until the expiration of his appointment as Chief Judge. The powers and jurisdiction of the court shall not be suspended for want of appointment or election, when the number of Judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

Const. 1846, art. VI, § 3, amended in 1869.

§ 9. Jurisdiction of Court of Appeals.

After the last day of December, one thousand *nine hundred and fifteen* [eight hundred and ninety-five], the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited

to the review of questions of law *whenever the decision of the Appellate Division appealed from be unanimous in affirmance of the Court below. But, if the Appellate Division be divided, or if its decision appealed from be one of reversal the Court of Appeals may review the facts and the law. But* no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.

The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals, *and may in any case allow an appeal and certify that justice requires that the Court of Appeals should review the facts as well as the law. Where the Appellate Division shall refuse to so allow an appeal and to so certify any Judge of the Court of Appeals shall have power to allow such an appeal.*

The Legislature may *otherwise* [further] restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any *Appellate Division* [*General Term*] before the last day of December, one thousand *nine hundred and fifteen* [eight hundred and ninety-five], but appeals therefrom may be taken under *then* existing provisions of law.

New.

§ 10. JUDGES NOT TO HOLD ANY OTHER OFFICE.

The Judges of the Court of Appeals and the Justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the Legislature or the people, shall be void.

Const. 1846, art. VI, § 10, amended in 1869.

§ 11. REMOVAL OF JUDGES.

Judges of the Court of Appeals and Justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein, *or they may be impeached before the Court for the Trial of*

Impeachments, either by resolution of the Assembly or on written charges by any Bar Association in the State preferred to the Governor, who in such case shall convene the said Court. All other judicial officers, except Justices of the Peace and Judges or justices of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

Const. 1846, art. VI, § 11, amended in 1869.

§ 12. [AM'D. 1909] COMPENSATION OF JUDGES; TENURE OF OFFICE.

No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. *Every Judge of the Court of Appeals, including Justices of the Supreme Court while serving as Associate Judges, shall receive from the State the sum of seventeen thousand five hundred Dollars per year. The Chief Judge shall receive fifteen hundred dollars per year additional.* Each Justice of the Supreme Court shall receive from the State the sum of $10,000 per year. Those assigned to the Appellate Divisions in the third and fourth departments shall each receive in addition the sum of $2,000, and the presiding justices thereof the sum of $2,500 per year. Those justices elected in the first and second judicial departments shall continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation as will make their aggregate compensation what they are now receiving. These justices elected in any judicial department other than the first or second, and assigned to the Appellate Divisions of the first or second departments shall, while so assigned, receive from those departments respectively, as now provided by law, such additional sum as is paid to the justices of those departments. A justice elected in the third or fourth department assigned by the Appellate Division or designated by the governor to hold a trial or special term in a judicial district other than that in which he is elected shall receive in addition ten dollars per day for expenses while actually so engaged in holding such term, which shall be paid by the state and charged upon the judicial district where the service is rendered. The compensation herein provided shall be in lieu of and shall exclude all other compensation and allowance to said *judges or* justices for expenses of every kind and nature whatsoever. The provisions of this section shall apply to the judges and justices now in office and to those *who become such by virtue of § 5 hereof, or who may be* hereafter elected.

§ 13. TRIAL OF IMPEACHMENTS.

The Assembly shall have the power of impeachment *of any judicial or public officer*, by a vote of a majority of all the members elected, *preferred to the Senate*. The Court for the Trial of Impeachments shall be composed of the President of the Senate, the senators or the major part of them, and the Judges of the Court of Appeals, or the major part of them. On the trial of an impeachment against the Governor or Lieutenant-Governor, the Lieutenant-Governor shall not act as a member of the court. No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the *Governor or to the* Senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in case of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment and punishment according to law.

Const. 1846, art. VI, § 1, amended in 1869.

§ 14. [AM'D. 1913.] COUNTY COURTS. *There shall be one in each and every county of the state, including New York County as hereinbelow set forth.*

The [existing] county courts are continued [and]. The judges *of the present county courts* [thereof] now in office shall hold their offices until the expiration of their respective terms. [In the county of Kings there shall be four county judges.] The number of county judges in any county may also be increased, from time to time, by the legislature, to such number that the total number of county judges in any one county shall not exceed one for every two hundred thousand, or major fraction thereof, of the population of such county. [The additional county judges in the county of Kings shall be chosen at the general election held in the first odd-numbered year after the adoption of this amendment.] The additional county judges whose offices may be created by the legislature shall be chosen at the general election held in the first odd-numbered year after the creation of such office. All county judges, including successors to existing judges, shall be chosen by the electors of the counties for the term of six years from and including the first day of January following their election. County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where [the] *either plaintiff or* defendant[s]

resides in the county, and in which the complaint demands judgment for a sum not exceeding $2,000. *County Courts shall have all powers legal or equitable requisite to finally determine the controversies of which they have jurisdiction. But* the legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds $2,000, [or in which any person not a resident of the county is a defendant. Courts of sessions, except in the county of New York, are abolished from and after the last day of December, 1895. All the jurisdiction of the court of sessions in each county, except the county of New York, shall thereupon be vested in the county court thereof, and all actions and proceedings then pending in such courts of sessions shall be transferred to said county courts for hearing and determination.] Every county judge shall perform such duties as may be required by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold county courts in any other county when requested by the judge of such other county.

The existing Municipal Courts are abolished from and after the 31st day of December, 1915, and the justices thereof then in office shall hold their offices until the expiration of their respective terms but shall become judges of the County Court of the county within whose bounds the particular municipal court of which they were justices exercised jurisdiction. All the jurisdiction of such municipal courts as now exercised shall thereupon be vested in the County Court of the particular county within whose bounds such municipal court or district thereof existed, and all actions and proceedings then pending shall be transferred to such county courts for hearing and determination, and all seals, records, documents, papers and books delivered to the Clerk of the County Court. In any county where there may thus be by reason hereof more than one Judge of the County Court, the said judges may, with the consent of the supervisors, or within the City of New York the Board of Estimate and Apportionment, appoint as many Divisions and designate as many court rooms and local clerks' offices for such Divisions as may be necessary to transact the judicial business theretofore transacted by both the existing County Court, if any, and by the Municipal Courts with their various districts in such particular county. The County Court of New York County shall be constituted of the Justices of the Municipal Court in and for the districts within its territorial limits. The Legislature shall by appropriate enactments in respect to salary provide for the organization of such County Court in any county where there is no such court at present.

From Id., Art. VI, § 15, as am'd in 1869. Further am'd in 1913.

§ 15. [SURROGATES' COURTS; SURROGATES, THEIR POWERS AND JURISDICTION; VACANCIES.] *County judges.*

[The existing Surrogates' Courts are continued, and the Surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the Surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature. The County Judge shall be Surrogate of his county, except where a separate Surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate Surrogate, the Legislature may provide for the election of a separate officer to be Surrogate, whose term of office shall be six years. When the Surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury.] No County Judge [or Surrogate] shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of County Judge [or Surrogate] shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any County Judge [or Surrogate] shall not be increased or diminished during his term of office. *But the Legislature may provide for increased compensation of County Judges whose jurisdiction is exercised within the territorial limits of a city of the first class.—Until such provision shall have been made or until the expiration of their respective terms of office to which on December 31st, 1915, they may severally have been elected, municipal court justices who then shall become by operation of this article county judges, shall continue to receive the salaries theretofore received by them to be paid in the same manner and from the same source as theretofore during their several terms to which they have been elected.* [For the relief of Surrogates' Courts the Legislature may confer upon the Supreme Court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of Surrogates, with authority to try issues of fact by jury in probate cases.]

Const. 1846, art. VI, § 15, amended in 1869.

§ 16. LOCAL JUDICIAL OFFICERS.

The Legislature may, on application of the board of supervisors, provide for the election of local officers, [not to exceed two in any county,] to discharge the duties of County Judge [and of Surrogate,] in cases of [their] inability or of a vacancy, and in such other cases as

may be provided by law, and to exercise such other powers in special cases as are or may be provided by law.

Const. 1846, art. VI, § 16, amended in 1869.

§ 17. JUSTICES OF THE PEACE; [DISTRICT COURT JUSTICES.]

The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the Legislature may direct, elect Justices of the Peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the Peace and judges or justices of inferior courts not of record, and their clerks may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the Peace [and District Court Justices] may be elected in the different cities of this State in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.

Const. 1846, art. VI, § 18, amended in 1869.

§ 18. INFERIOR LOCAL COURTS.

Inferior local courts of civil *or of* [and] criminal jurisdiction may be established by the Legislature, but no inferior local court hereafter created shall be a court of record. The Legislature shall not hereafter confer upon any inferior or local court of its creation, any equity jurisdiction or any greater jurisdiction in *any* [other] respect[s] than is conferred upon County Courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the Legislature may direct.

Const. 1846, art. VI, § 19, amended in 1869.

§ 19. CLERKS OF COURTS.

Clerks of the several counties shall be clerks of the Supreme Court, with such powers and duties as shall be prescribed by law. The Justices of the Appellate Division in each department shall have power to appoint and to remove a clerk, who shall keep his office at a place to be designated by said Justices. The Clerk of the Court of Appeals shall keep his office at the seat of government. The Clerk of the Court of Appeals and the clerks of the Appellate

Division shall receive compensation to be established by law and paid out of the public treasury.

Const. 1846, art. VI, § 20, amended in 1869.

§ 20. No judicial officer, except justice of the peace, to receive fees; not to act as attorney or counselor.

No judicial officer, except Justices of the Peace, shall receive to his own use any fees or perquisites of office; nor shall any Judge of the Court of Appeals, or Justice of the Supreme Court, or any County Judge [or Surrogate] hereafter elected [in a county having a population exceeding one hundred and twenty thousand,] practice as an attorney or counselor in any court of record in this State, or act as referee. [The Legislature may impose a similar prohibition upon County Judges and Surrogates in other counties.] No one shall be eligible to the office of Judge of the Court of Appeals, Justice of the Supreme Court, or [except in the county of Hamilton, to the office] of County Judge [or Surrogate], who is not an attorney and counselor of this State.

Const. 1846, art. VI, § 21, amended in 1869.

§ 21. Publication of statutes.

The Legislature shall provide for the speedy publication of all statutes, and shall regulate the reporting of the decisions of the courts; but all laws and judicial decisions shall be free for publication by any person.

Const. 1846, art. VI, § 23, amended in 1869.

§ 22. Terms of office of present justices of the peace and local judicial officers.

Justices of the Peace and other local judicial officers provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms.

Const. 1846, art. VI, § 25, amended in 1869.

§ 23. Courts of special sessions.

Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.

Const. 1846, art. VI, § 26, amended in 1869.

ORGANIZATION AND PROCEDURE OF THE COURTS [1]

WILLIAM L. RANSOM

Justice of the City Court of the City of New York

I HAVE had before me for several days the manuscript of Mr. Jessup's suggestions and the report of the committee of the Phi Delta Phi, and have had opportunity to examine them with some care. In many respects they parallel recommendations which the bar associations are likewise urging, but you have under consideration here the coördinated plan proposed by Mr. Jessup, and I shall shape my discussion accordingly. I am sure that the bench and the bar of the whole state will recognize their debt to Mr. Jessup for his labors in behalf of a more efficient judicial system, and also their debt to the committee of the Phi Delta Phi for the concrete and tangible form in which its recommendations are presented. In no respect will this conference of the Academy perform a greater public service than in thus placing emphasis, now and hereafter, upon the importance of concrete formulation of every suggestion which anyone has to make along the lines of constitutional change, to the end that the same may be thought out and fought out before the convention itself comes together in Albany next April. I hope that the Academy and its program committee will strongly recommend, if not absolutely insist, that I and every other speaker who utilizes this platform to urge any change in the existing constitution of the state, shall follow Mr. Jessup's example and annex to the printed version of his remarks, in at least some tentative form, "*the black-and-white*" of exactly what he proposes.

No length of experience on the bench or at the bar is available to give weight to anything I may say in discussion of the

[1] Discussion at the meeting of the Academy of Political Science, November 19, 1914.

details of Mr. Jessup's suggestions, but I come to you from a tribunal of which each member conducts probably more jury trials of civil cases each month and each year than does any justice of any other court in America, and I can at least indicate to you how some of these things appeal to me, from the viewpoint of that daily contact. It seems to me that Mr. Jessup's proposals, and the parallel proposals of the Phi Delta Phi and some of the bar associations, have the merit that they spring, not from preconceived abstractions or pre-disposition to change, but rather from the actualities, "the grass roots," of the hard, day-by-day experience of the bench and bar. Considered as a whole and with due allowance for some difference as to details, they represent only conservative and well-demonstrated changes in either the substance or the phraseology of the existing constitutional provisions; and it seems to me to be the first axiom of any revision of the judiciary article, that there should be no change in its well-litigated wording or its well-tried substantive provisions, except on the basis of what has been established by convincing experience and what offers reasonable certainty of improvement in that which we already have. You may or may not believe, as I do, that other and further changes in the judiciary article, over and above what Mr. Jessup has discussed, should and will receive careful consideration at the hands of the constitutional convention; but this I do not believe can be gainsaid, that if the convention should bring about no other thing than the writing into our fundamental law of substantially the provisions formulated by the Phi Delta Phi, the work of the convention would nevertheless be worth to the state a thousand times more than the convention will cost, and New York would be placed actually in the lead of all the states in the efficiency and suitableness of her machinery for the administration of justice. Improved in detail these recommendations can, and doubtless will be; but they represent an acceptable minimum of positive advance.

Doubtless you all were impressed by what Mr. Jessup said regarding the relative inefficiency of our judicial system as a mechanism for securing the results to which it is consecrated. I do not suppose that an alert business man or "business law-

yer," ever comes from his well-organized, perfectly coördinated office into a court in this city without feeling somehow, consciously or unconsciously, that the court has failed to keep pace with the life of the community which surges outside its walls, and that somehow the organization, procedure, and administrative routine of the court are still of an era which the community outside has necessarily superseded, in order to hold its own in the commercial competition of the times. The tribunal to which, as a last resort, the business man submits his controversies with his fellows, is practically the only institution of private or public activity which, in its administrative and procedural methods, still lumbers on in the same old way of fifty years ago. Right here, I am inclined to believe, will be found the responsibility for a large part of that variance to which Mr. Jessup has referred, between justice as administered in a court and justice as innately conceived by the average man of intelligence and good conscience. I do not find men unwilling to have their disputes and controversies determined and their rights of property adjudicated according to the principles of our substantive law. It is not a desire to avoid the application of rules of law which drives business men out of our courts, into reluctant settlement of controversies which should be litigated or into the submission of them to arbitration tribunals established by private agencies. Litigants do not submit themselves before arbitration committees of commercial organizations in order to secure the *arbitrium boni viri* or to subject their property and rights to individual judgment as substitute for long-established rules of the substantive law. The aversion of the business man is to the procedural and administrative side of our legal machinery. He believes in and needs the administration of justice according to law; the safety of his transactions requires certainty and rule as the basis of individual and property rights. Popular dissatisfaction with the law, as I find it, is based not so much upon the variance between justice according to the substantive law and justice according to the *arbitrium boni viri,* as upon the variance between the justice which would result from a fair, prompt determination of controversies according to substantive legal

principles and the justice which does result from the existing procedural mechanism of our courts. Business men go to arbitration to avoid legal *procedure* and not legal *principles*. I wish I had time to comment further on this phase of Mr. Jessup's remarks, but I have not, except to say that to tune up and speed up our judicial mechanism, to cut out the delay and the "lost motion," to organize our courts along lines which take cognizance of twentieth-century experience and expedients, and to bring to the aid of the courts those direct and simple administrative aids which modern progress has made available in every field of activity, is, to my mind, one of the paramount tasks of to-day. As Mr. Taft said in Chicago in 1909: "Of all the questions that are before the American people, I regard no one as more important than this: to wit, the improvement of the administration of justice."

Much of this improvement will come, and is coming, not from changes in constitutions or even in codes or statutes, but rather from changed point of view and added efforts on the part of both judges and lawyers. Some of these matters we have lately been at work upon in New York county, and in my own court, at least, I know that it is not too much to say that administrative changes made by the justices themselves have increased by not less than twenty-five per cent the absolute efficiency of the court in the dispatch of business; and in the enhanced suitableness of the court as a forum for meeting the public needs to which it is designed to minister, the relative increase has been far greater. For example, within the present month we have put in force a separate commercial calendar, on which actions on commercial paper or for goods sold and delivered, and the like, are reached for trial within three or four weeks, instead of a year or more, after suit is started. In actions of this character, delay of determination is, to an unusual degree, likely to amount to a denial of justice, and by administrative changes in other parts of the court, it has been possible to give this preference to commercial causes without appreciably prolonging the time within which other classes of actions may be reached for trial. When one sees at first hand the things which can and some day will be done, by

way of " taking the slack " out of the existing judicial mechanism, utilizing the waste and avoiding the indirection therein, organic change seems far less important and there comes a powerful disposition to concentrate energies on the task at hand. Nevertheless, the people of the state have chosen a constitutional convention, and have elected to it men peculiarly adapted to deal intelligently and remedially with the existing judiciary article. The convention will, I take it, be especially inclined to give weight to the recommendations of the bar association and similar organizations, and it will be both surprising and disappointing if the labors of the convention do not give us a substantially improved judicial establishment, one which will lend itself even more suitably to the forward movement along the lines to which I have referred.

But I must hurry on. Perhaps the best thing I can do, in the few minutes remaining, is to refer to one or two other things which seem to deserve consideration by the convention. These conveniently classify themselves under three heads:

(1) Improvement in the method of selecting judges.

(2) Provision for adequate representation and presentation of the public interest in judicial consideration of the constitutionality of statutes.

(3) Aids to the development of a more simple, direct and suitable judicial procedure and the prompt determination of controversies according to established legal principles.

Time does not permit me to do more than refer to these topics.

Improvement in the Method of Selecting Judges

Ought not the new constitution to bring about at least some substantial improvement in the methods of nominating and electing judges? Are we not ready to make some substantial advance in this respect? Ought not the new constitution at least to make mandatory the providing of a separate ballot for the election of judges, such ballot to bear no party names or emblems and no numbers or other designations of candidates? I grant that for executive and legislative officers, it is

desirable to continue, even under the Massachusetts form of ballot, the presence of the party names and emblems on the ballot, because there is a Republican way or a Democratic way or a Progressive way of administering those offices, and it may well be urged that a voter is entitled, and should be enabled, if he so desires, to vote for officials who will administer those policy-determining offices from a party point of view, even though the voter knows neither the names nor the qualifications of the candidates. In the case of judges, should we longer permit that method of choice? Should we suggest, by our form of ballot, that there is a partisan way of administering a judicial office or that party membership should be a basis of election thereto? Ought not the new constitution to put a premium on intelligence and discrimination in the choice of judges, and separate their election distinctively from the category of offices which are or may be voted for in a blind and purely partisan manner? The constitutional convention will doubtless consider the subject of requiring non-partisan judicial primaries, in complete substitution for the present system of party nominations of candidates for judicial office; but if it be deemed that the time has not yet come to stipulate in the organic law for a purely non-partisan mode of nomination as well as election, the requirement of a separate judicial ballot, bearing no party names, emblems, or numbers, would seem to be a step for which public sentiment in the state is fully prepared.[1] The new constitution ought to help along the cause of greater care and intelligence in the choice of judges, at least to the extent of making it impossible for an elector to participate in the election of judges without at least ascertaining the

[1] The following is a tentative suggestion of the possible phrasing of an amendment to the existing constitution to accomplish the above-indicated purpose: Amend Article II, Section 5 thereof, entitled, "Manner of Voting," by adding at the end of Section 5 the following new matter: "At any election at which a judge or justice of a court of record is to be chosen by the electors, a separate ballot therefor shall be provided, which ballot shall contain the names of all the persons nominated for any such judgeship or justiceship to be filled at such election, but shall not contain the name or emblem of any political party or other nominator, or any number or other designation in connection with the name of any candidate appearing thereon."

names of the men for whom he wishes to vote! In connection with this same subject of selection of judges, another interesting suggestion has been made, which is regarded by some as combining the advantages of both the system of popular election and the system of executive selection. It is that the executive be given the power, whenever any judicial office is to be filled at an election, to make seasonably a selection or nomination of a candidate for the place, such candidate to be, by virtue of such executive designation, entered as a competitor in each of the party primaries and at the polls, subject to the right of the person so designated to decline to be a contestant in the primaries of any particular party or, in his later discretion, at the polls. If upon full consideration, this plan seems to offer a desirable modification of the elective system, it will be found in accord with our fundamental political theory of giving to the executive large powers for the proper direction of government, with full opportunity for the people to deal effectively with the unwise exercise of that power. Personally, I have not yet reached a conclusion whether such a combination of the appointive and elective system is desirable.

Closely related to the selection of judges is the question of their tenure, accountability and discipline. In every state constitutional convention in recent years, this has been a subject most vigorously debated, not always with fortunate outcome. Strangely and most illogically, the emphasis has commonly been on improving, or at least changing, the modes of removal, rather than on improving the mode of selection. Most illogically, the efforts of supposedly "progressive" elements in such gatherings have been centered on forcing through more facile means of getting rid of thoroughly objectionable judges after election, rather than means of preventing the election to the bench of men at all objectionable. Likewise illogically, it seems to me, the efforts of those opposing innovation in judicial tenure have been too often confined to mere opposition; they have failed to recognize that the way to obviate any need for easier ways of getting rid of objectionable judges is to adopt means ensuring a more careful and discriminating popular choice in the first instance. May we not hope that in our New

York convention the emphasis will be placed on prevention rather than on subsequent surgical relief from the consequences of poor choice?

Over and above this, however, it seems to me that those of us who oppose, as I have always opposed, the adoption of the "recall of judges" owe it to ourselves and to our deep convictions on the subject to offer constructive methods for dealing with the conditions which give rise to the demand for the expedient which we deem unsuitable and dangerous. There *are* such conditions and there *is* such a demand. I doubt whether anyone could read the report of the State Bar Association Committee (1913) on the Causes Underlying the Dissatisfaction with Our Judicial System, without realizing that there *is* dissatisfaction and prevalent criticism, on the part of great numbers of our people, and that this dissatisfaction and criticism is based, in large part, upon specific instances which are believed to show judicial misconduct or perversion of justice, but which have, with rare exceptions, never been the subject of any inquiry or report by any judicial or other tribunal. The average man, when he is the victim of what he believes to be judicial impropriety or when he learns of a judicial act which he believes has inflicted injustice on a friend or neighbor, is inwardly exasperated and embittered because of the lack of remedy, the lack of forum to which to complain, the lack of tribunal which can give him a hearing, which will let him bring his grievance into the light, and will take pains to develop the facts on the issue whether his grievance is well-founded. Ought not there to be in this state a permanent tribunal, before which complaint regarding the conduct of any judicial officer might be made at any time by any lawyer or by any citizen, and ought not such a tribunal to have plenary power to investigate and report concerning any such complaint, power to censure and perhaps to discipline, power also to institute before the legislature impeachment or removal proceedings as to any judge, and power to institute before the appellate division proceedings for the disbarment or discipline of any lawyers involved in any matters as to which complaint was laid before such tribunal? Would it not be for the best interests of judges, lawyers and litigants alike,

that there should be such a tribunal always open to receive and promptly investigate complaints concerning our judicial system, rather than that such grievances, real or fancied, should be left to rankle long in the minds of those concerned, embittering them with our free institutions, or that these self-magnifying grievances should be left to form the subject-matter of inflammatory and unfair appeals to an electorate which cannot possibly investigate the facts concerning them, at the time when the judicial officer in question goes before the people for re-election on his whole record? Would it not be better to have the charge or suspicion threshed out at the time it arose, and the facts judicially ascertained? That is why I suggest that the convention consider the adoption of some such plan as was worked out in the Ohio convention, whereby, in addition to the removal and impeachment provisions (which Mr. Jessup's draft strengthens in important particulars), constitutional sanction might be given for the creation and powers of such a tribunal. The make-up and mode of selection of so august a body would not necessarily be fixed in and by the constitution itself; authority for its creation by the legislature would be sufficient.

Would not the results be most wholesome? Would they not tend to strenghten our whole juridical system in the public confidence? The best thing you can do for and with a man with a grievance is to let him *tell* it, "out loud," as we used to say in school, and let him try to *prove* it before his fellow men. A grievance regarding the fairness or integrity of a judicial officer is the last of all grievances that a democracy can permit to remain "un-aired" and unadjudicated. In this connection, I may say that I think the effect upon the relations between the bench and bar would be most advantageous and salutary. There is no reason why men should not have opportunity to tell what they honestly think about judges and courts. The frank recognition of such a right will be a good thing for both lawyers and judges. I have great regard for the dignified and mutually deferential relation which should, and usually does, obtain between court and practitioner; I look on it as an indispensable aid in the impressive administration of justice; but I would rather see that dignity and deference builded on respect rather

than primarily on suppression and fear of "contempt" or disbarment proceedings. I should dislike to think that the accident of an election which transferred me from an administrative to a judicial office could deprive members of the bar, who came before me then and come before me now, of their right to comment freely and complain vigorously, in my presence or elsewhere, concerning anything which they might honestly think was an abuse, on my part, of official propriety and discretion. It would greatly improve the administration of justice if a lawyer could safely present his client's right, and his own and his client's sense of grievance, to some such tribunal as I have indicated, even though that right or that sense of grievance arose from some abuse of power or breach of propriety on the part of a judicial officer. A lawyer, litigant, or ordinary citizen, who conscientiously believes that a judge has been guilty of improper conduct, and is willing to take the responsibility of complaining about it and doing what he can to prove it, should be afforded a fair opportunity and a suitable, at-hand tribunal for so doing. And when that tribunal has been brought into being, there should be coupled with its creation the further proviso, so well phrased by Mr. Charles A. Boston in a remarkable address before the State Bar Association last year, that "no court in this state shall have hereafter any power to disbar or discipline, in his official relation, any lawyer, for making any charge against the manner of administering justice in the court, until the lawyer has had an opportunity to demonstrate the truth of his charges before such a tribunal, and not then, unless this tribunal shall first certify that the lawyer acted without probable cause."

Representation of the Public Interest in Judicial Consideration of the Constitutionality of Statutes

Ought not the coming convention to give careful consideration to ways and means of ensuring that in judicial consideration of the constitutionality of statutes, there shall be not only adequate representation of the public point of view in the suit in which the question of constitutionality is raised, but also adequate presentation of the public interests involved? Under

our form of government, we are committed to the determination of far-reaching questions of constitutional power and governmental policy in inconspicuous suits between ordinary private litigants—oftentimes in suits brought into being by interests seeking to obtain thereby a decision adverse to the validity of the statute and therefore controlling the conduct of both sides of the litigation to that end. The conference of hostile interests to frame a "test case" is a familiar preliminary to an acute legal onslaught on the constitutionality of a legislative enactment. Are we willing to leave our constitutional questions to an arbitrament in which counsel on both sides represent the hostile private interests and only the court is the possible champion of the public rights and the public interests? Might it not well be provided that no appellate court should hear or determine any appeal in which such a constitutional question was involved, except upon proof that the appellant therein had duly notified the attorney general of the state that such a question was involved in the appeal then pending and on proof that copies of the appeal papers and briefs had been duly served on the attorney general, who should have the right to intervene and be heard upon the argument of any such appeal?[1] Or might a similar result be more satisfactorily secured by providing that the state of New York is a necessary party defendant in any action in which either party asserts the unconstitutionality of a state statute?[2]

[1] This result could be brought about through the insertion, as a new section or at the end of a suitable existing section, of phraseology somewhat as follows: "In the trial or hearing of any action or proceeding in any court, in which the invalidity of a statute of this state is asserted by any party thereto, the attorney-general shall have the right to intervene at any time and be heard upon the question of the validity of such statute. The appellate division or the court of appeals shall not hereafter hear or determine any appeal in which the invalidity of any such statute is asserted, except upon proof that the appellant in such court had seasonably notified the attorney-general of the pendency of such appeal and had duly served him with all papers on such appeal, as though the state of New York were a party to such action or proceeding."

[2] A method of giving formulation to this plan would be to add to the judiciary article a new section, to read somewhat as follows: "In any civil action in which a party thereto asserts the invalidity, under this constitution, of a statute of this state, the state of New York shall be a necessary party defend-

In dealing with this general subject of the relation of the courts to legislation, the convention may perhaps also give consideration to the advisability of adopting, in this state, some provision similar to that contained in the present constitution of the state of Ohio, to the effect that the concurrence of more than a majority of the judges of the court of appeals sitting in a particular case shall be necessary to a determination that a statute involved therein is unconstitutional.[1] In Ohio, the concurrence of all but one of the members of the highest court of appeal is required, except in cases where the court of intermediate appeal has itself held the statute unconstitutional.

Aids to the Simplification of Procedure and the Prompt Determination of Controversies

Finally, what constitutional aid may be given to the simplification of legal procedure, the avoidance of jurisdictional technicalities, the clarification of litigated issues, and the prompt disposition of all phases of a controversy in a single trial? I have not discussed, and shall not discuss, in these remarks, the details of what Mr. Jessup urges as to the consolidation of courts. I feel that what he urges is sound in principle, but I am not yet sure that in details he presents altogether the wisest plan. For example, I am not certain as to the wisdom of the abolition of the surrogates' courts as county tribunals in upstate New York. In this county, it makes perhaps no fundamental difference whether the function of the existing surrogates' courts is performed by those courts or by a probate division of the supreme court for New York county; but I am

ant; but no such action shall be deemed a suit against the state, within the meaning of this constitution, and in no such action shall any award of costs or any other money or thing be made for or against the state as such party defendant."

[1] A formulation of such a provision would be the following, to be added to an existing section of the judiciary article or to constitute a new section thereof: "Except in affirmance of a decision of the appellate division of the supreme court that a statute of the state is invalid under and by reason of the provisions of this constitution, the concurrent action of more than a majority of the judges of the court of appeals hearing an appeal therein shall be necessary to a determination by the court of appeals that such a statute is invalid as aforesaid."

not clear that the electors of upstate counties will wish to see the intimate and almost sacred functions of the surrogates' courts taken away from officials chosen by them in and for their particular county and turned over to supreme court justices chosen by a judicial district of many counties, some of which are rarely, if ever, represented in the supreme court for the district. Again, in the upstate counties, the county court is an invaluable local tribunal, which no revisers would seriously think of tearing down. It meets the local need most suitably. But that is not by any means conclusive proof that the establishment of a county court in New York county would be the best means of dealing with our metropolitan situation. Neighborhood or district courts are required for the handling of the smaller causes, and what is needed, I am inclined to believe, is not the transfer of those controversies to any tribunal which will follow, even more closely than the present municipal courts, the formalities and technicalities of the procedure in courts where trials are conducted by able counsel. What is preferable, it seems to me, is that the municipal courts shall be made, to an even greater extent than now, tribunals of arbitration, conciliation and adjustment, rather than of formal trial. What is needed is to free these district or neighborhood courts of the incubus of the code of civil procedure and make them even more fully a forum in which substantial justice, common sense and fair dealing according to well-settled principles of the substantive law, are administered through methods of inquiry which more nearly resemble the simple, direct, exact business methods of the time than the technical procedure and involved evidentiary rules of the courts of law. If the municipal courts were made a tribunal of that character, it might then be practicable to vest in a court of general jurisdiction the trial of all cases in which a formal trial at law was to be had, irrespective of the amount involved. When every phase of a case, every phase of a subject-matter of controversy, can be determined in one court, and can receive the continuous attention of but one judge rather than the casual animadversion of many, we shall have made progress in bringing the machinery of the law abreast of present-day standards of effi-

ciency and directness; and I do not believe that we can have an economical, expeditious and common-sense system until we have eliminated from justice as administered in the courts the jurisdictional disputes and technicalities which are the by-product of the present illogical, awkward and expensive division between uncoördinated tribunals.

What constitutional aid may be given to the summary and scientific disposition of all procedural and preliminary applications? I am of the opinion that the recommendation of Mr. Jessup's committee for supreme court commissioners or masters is the soundest that has been made, and that it would work a really monumental reform in the administration of justice. What is needed is that up to the time a civil action comes on for trial, it should have the continuous oversight of one trained judicial mind; that there should be one judge or one master who would hear all preliminary and procedural application in the case, and who would have both the power and the duty to see to it that the pleadings are in proper shape to present the issues, that the issues are narrowed and clarified, that all facts not really in dispute are reduced to written concessions of the parties for the purposes of the trial, that sham and fictitious issues are eliminated, that bills of particulars are furnished and proper examinations before trial are conducted, and that the controversy is made ready for prompt and expeditious trial on the merits. The evils of having procedural applications in the same case submitted successively to perhaps a dozen judges are the bane of the daily life of the judge who has finally to try the case, and are a prolific source of trouble on appeal. Rarely does a case come before the trial judge in which he does not painfully realize how much the controversy really entitled to be litigated might have been simplified and shortened, had the cause had some such preliminary oversight as I have mentioned. In addition, every lawyer will realize that any such oversight would mean that many actions would never survive this oversight and never would reach the day calendar for trial at all, but would be settled or disposed of in the preliminary stages. How many baseless causes of action and how many fraudulent and unfounded defenses would go down in

such a first-hand oversight. Calendar congestion would be greatly reduced, through shortening the time required for the trial of cases and lessening the number of cases actually tried. The most practicable plan I have yet seen for bringing about the results we all have in mind along these lines is the system of "commissioners" or "masters" for which the Phi Delta Phi report proposes constitutional sanction, and I hope for the unabridged adoption of this portion of the report.

Ought not the new constitution definitely to give the weight of its great authority and influence to the prompt determination of causes on their substantial merits, without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties? Ought not this to be made the constitutional ideal of our judicial system? May not the new constitution give a definite impetus, a far-reaching fundamental sanction, to a conception of law which looks on rules of procedure as instruments of justice, rather than ends in themselves, and looks beyond the forms to the substance?[1] Who can estimate the effect of writing so salutary a provision into our organic law? You may say that a similar provision could be passed by the legislature, without making it a part of the constitution, but I believe that a provision which relates so closely to the fundamental spirit of our judicial system, deserves a place in the constitution and ought to have back of it the emphasis which such a place could alone give it. In this same connection, might not the appellate courts well be given express constitu-

[1] A new section of the judiciary article is suggested, to read somewhat as follows: "No judgment shall be set aside or reversed or a new trial granted by any court in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error or omission as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error or omission complained of has injuriously affected the substantial rights of the parties and that some substantial wrong or miscarriage was thereby occasioned at the trial."—[NOTE: This provision closely follows the phraseology of the act binding on the English appellate courts and also of the bill introduced by Senator Root and repeatedly endorsed by the American Bar Association for the government of appeals in the federal courts.]

tional sanction for a broad power as to the entry of what they deem to be the proper judgment in the case before them, instead of merely remanding for a new trial if unable to affirm the judgment below?[1] That is to say, if the appellate court does not find that there was rejected or omitted from the record of the trial below any evidence which might affect the proper disposition of the case, ought not the appellate court to have a considerable power to render the judgment which it thinks ought to be rendered, in view of all the testimony in the case, instead of sending the case back to a re-trial, from which it will probably come again to the appellate tribunal?[2] Injustice might in some cases result from the exercise of such a power by the appellate court, just as injustice results in other cases from the remanding for a re-trial. It is difficult to tell which rule and practice would ordinarily achieve a larger degree of substantial justice, but may not this discretion well be given to

[1] This should doubtless be made the subject of a new section of the judiciary article, somewhat as follows: "Upon any appeal from a judgment or order, the appellate division, or the court of appeals in any case in which its review is not limited to questions of law, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and shall thereupon render judgment of affirmance, judgment of reversal, and final judgment upon the right of any or all the parties, or judgment of modification thereon, according to law, except where it may be necessary or advisable to grant a new trial or hearing, in which event a new trial or hearing may be granted."

[2] Reversals for omissions of evidence and the like might be still further reduced in number by the adoption of a constitutional provision along the following lines, paralleling some of the provisions of a statute enacted in Massachusetts by chapter 716 of the Laws of 1913 of that state, but for which constitutional sanction would probably be required in New York, in view of the construction placed on existing provisions of our state constitution: "The appellate division and the court of appeals, upon the hearing of any appeal, shall have all the powers of amendment of the trial court; and whenever exceptions have been taken to the exclusion of evidence, or where the alleged error arises from the omission at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury and without substantial injustice to either party, the appellate court shall have power, in its discretion, to cause such further testimony to be taken as it deems necessary, either by oral examination in court, by reference, by production of a document or record, by affidavit, or by deposition, and the court shall have the power to render any judgment and to make any order that ought to have been made upon the whole case."

the appellate court itself? Looking at the matter in a large way and in the long run, would not the efficiency of our judicial system be promoted through the wise exercise of such a power, better than through a more general resort to the expensive and dilatory practice of re-trials and re-appeals? The legislature in 1912 enacted section 1317 of the code of civil procedure. This section represents a valuable step in the direction of the ends sought by the amendment first referred to under this heading (see note 1 on the preceding page), and the court of appeals has very recently, in the case of Lamport *v.* Smedley, decided November 10, 1914, given a broad and wholesome construction to the powers conferred by the new section. Embodiment in the fundamental law of the supplemental provisions which I have indicated, would tend still further, and far more decisively, in the same salutary direction. I believe that the appellate courts ought to be encouraged and fortified in entering the final judgment they deem proper, when unable to affirm the judgment below, and that as a rule such a power will be exercised in a way more consonant with substantial justice than could be worked out through clogging court calendars with protracted re-trials and re-appeals. In one "grist" of appellate division decisions not long ago, it was estimated that enough cases were sent back for re-trial to keep the trial parts of the supreme court busy for a week. On the whole, I think the litigants would be likely to get as satisfactory and just a determination from the appellate tribunal as from a re-trial, and to get it much sooner, with less clogging of the way of other litigation coming on for its day in court. The whole subject at least deserves the thoughtful consideration of the convention.

You may ask: "Why should even the brief provisions you have tentatively phrased be put into the constitution? Why may not all these matters be left to form the subject-matter of statutes?" The answer is at least three-fold: In the first place, for all except one or possibly two of the suggestions, constitutional action is probably requisite to their valid adoption in this state. Decisions interpreting existing constitutional provisions raise serious doubts whether these things

could be brought about by statutes. In the second place, these suggestions relate to and would vitally affect the fundamental spirit of our laws and our judicial system. For example, certain of them propose a transformation of our appellate tribunals from courts of error to courts of appeal—tribunals in which error would be corrected and not merely detected, tribunals in which further delay and expense would not be the inevitable penalty of the appellant's success or the discovery of more or less consequential errors below, tribunals with an affirmative responsibility for determining the right result rather than merely a negative responsibility for saying whether the court below has permitted a wrong result. Surely so fundamental a change in the spirit and theory of our judicial system should have its basis in constitutional provisions and have behind it constitutional sanction. In the third place, if the results to be secured are as important as they seem to be, we can well afford the few lines of printed matter requisite for their expression in the fundamental law. Better a few more lines and a few short sections there, than the continuance of the delay and technicality and denial of justice which recurs through their absence. If we can shorten the time, lessen the expense, and simplify the machinery, for the trial of controversies which come into our courts, and can attain more closely to that certainty and fairness in the application of rules of law which is the ideal of our jurisprudence, we can afford the space required to give a constitutional basis for it, and thus enable the submission to the people of a judiciary article which will be the most notable feature of the new constitution.

ROBERT LUDLOW FOWLER

Surrogate of the County of New York

When I had the honor to accept the invitation of the Academy of Political Science to discuss Mr. Jessup's paper I stated that I could make no preparation and should have to trust to such observations as occurred to me without premeditation. Mr. Jessup is a learned specialist in a department of

law in which I take great interest, and I naturally desired to be present on this occasion.

If I understand the purport of Mr. Jessup's paper, it unfolds three propositions. The first, and perhaps the most important in the abstract, is that the justice commonly administered in the courts of our country, and I presume in the courts of our own state, is not at one with "justice;" in other words, that the law which we administer is not consistent with that abstraction which is known as "justice." I had always supposed that law was justice and that justice was law, and that there could be no great distinction between law and justice; at least, I labored under the vain hope that in the court in which I sit the law I administer is justice and the justice I administer is law. It is a very old philosophical discussion, the difference between justice and law.

The common law is a very great system. It is the tradition of the dead of our race and kind. It is the legacy of all the men of the past. It is the crystallized wisdom of the ages which have preceded us. If that law and that experience were not consistent with justice, it would be a very singular thing. One of the greatest names in the philosophy of the common law, undoubtedly, is that of Thomas Hobbes, who investigated the question and came to the conclusion that there could be no definition of "justice" except "law."

My learned and very esteemed friend, Mr. Jessup, has suggested that perhaps law could be found in what he termed the *arbitrium boni viri*; that is, "in the opinion of a good man;" but that, you will see in an instant, is pure idealism. Law cannot exist in the bosom of any good man. Law is a concrete thing; it is a force; it is the force of government, and it is not the *arbitrium boni viri*; so much for that.

It is rather the fashion at this day—and we live in a singular day of criticism and change—to criticize the law which is administered by the courts of this country; but let me say to you that the courts are the very bulwark of the country. They are the one persistent force which gives order to our society; more respectable than any other branch of the government, more permanent, more conservative than the executive or the legis-

lative branch of the government are the courts of justice. I think there can be no doubt that it would be the verdict of the citizenship of this country, for example, that the contribution of the Supreme Court of the United States to good government, to permanency of institutions and to our general prosperity, exceeds, or certainly equals, that of any other branch of the public service.

The second idea which my learned friend unfolds is, that the improvement in the workings of the law and of the judiciary in this state will be fostered by consolidation of the various courts of this community. No doubt some of the courts may be consolidated with some advantage. My off-hand suggestion would be that the small courts must continue to exist. The small courts are the "small change" of society; just as small change is necessary for small transactions, small courts are necessary for small litigations and small suitors. Whether or not it would be good policy to consolidate the small courts with what we regard as the more important courts of the community I think may be open to some question. It might prove a leveling down instead of a leveling up, and after all, the object of courts is efficiency and dignity in the administration of justice. I think we may safely leave those considerations to the action of the constitutional convention as it has been chosen.

The next point developed in the paper of my friend is that it is desirable to cut off all sorts of technicalities from our judicial proceedings. Up to a certain point that is undoubtedly a valuable suggestion; but we belong, of course, to a technical profession, and the first point for the consideration of judges and lawyers is accuracy of judicial proceedings. It is not a waste to spend time in ascertaining what the real point of a litigation is.

I think part of the embarrassment, if there be embarrassment, in the working of our present system, has been occasioned by the excess of legislation affecting procedure, and particularly affecting the code which was originally presented for the action of the legislature about 1847. This was a small and admir-

ably drafted instrument. Amendments and alterations of that instrument by the legislature should be stopped.

The procedure in courts of justice may safely be left to the judges; perhaps somewhat after the plan adopted in England. It is not always the case, however, that plans adopted in England are well adapted to our system. If it is possible for the constitutional convention to take up the question of procedure, there is no doubt that good work may be done in simplifying the procedure in the courts of justice of this state.

THE EXECUTIVE AND THE JUDICIARY[1]

FRANCIS LYNDE STETSON

AS Mr. Mills was speaking of a more direct relation between the executive and the legislature, I recalled perhaps the first practical experiment in that direction made in this state, in the year 1873. The new charter of the city of New York adopted at that time provided that the heads of departments might sit and debate, but without a vote, in the common council or in the board of aldermen. I believe that right still continues. At least it did continue for a long time, but without the slightest consequence, and largely for a reason which underlies the question of President Schurman; namely, that no consequence attached to the flouting of the advice of the head of a department and no responsibility rested upon the head of a department for giving bad advice.

I do not believe that any great popular movement ever developed without having behind it some element of sense, and I have been rather inclined to think that, in a blind, groping way, the people have been trying to enforce responsibility upon the executive by the suggestion of what is called the recall. That is one way in which they are trying to get at the public officer who in their estimation is not doing his duty. While I am not an advocate of the recall as it has been projected, yet I can see that in some way or other, we might combine with our system of fixed terms, to which President Schurman has justly referred, some method of imposing upon the executive the necessity of giving good and acceptable advice, at his peril, or upon the legislator of accepting good advice, or refusing it at his peril, such as prevails under the British principle of responsible ministries.

As to the judiciary, I believe in the establishment of a rule to which men may refer for instruction and information as to

[1] Discussion at the meeting of the Academy of Political Science, November 19, 1914.

what is "justice." The late Francis N. Bangs used to refer contemptuously to the justice administered by many judges as "the justice of the kadi," the magistrate who in the presence of the son of the one woman, or of the other, threatened to put the child to death, with the idea that the way to extract the best testimony as to the maternity of the threatened infant would be an appeal to the emotions.

Now that is the rule according to the kadi for the particular case, but that rule affords no guidance or help for the student of law. It gives no settled basis upon which the lawyer can advise his client, be it remembered, and rules are not ordained solely for the advantage of the lawyer. They are for the benefit of the inexpert client, who, in order that he may have justice in his particular case, is entitled to the benefit of the advice of a man learned in the law, and no man can be learned in the law unless there has been an established and continuous rule of law. Whether that law shall be embodied in a series of just decisions or precedents, or whether it shall be established by the mandate of the legislature, has been a secular controversy, which is not going to be settled in the next constitutional convention of the state of New York, either for all time or probably for any considerable time. Probably we can do best, as has been suggested, by attempting to distinguish conclusively and clearly between the adjective law and the substantive law, and then, as also has been suggested, by leaving the adjective law, so far as it concerns procedure, for development by the courts through their rules.

Mr. Root sometime ago very wisely said that he objected to any new legislation upon the subject, no matter what it was, for the reason that it would constitute simply one additional bulwark over which the judge would have to leap before he could find his way toward the ideal justice which we are all seeking. Therefore, on that branch, I feel strongly, and not having been a candidate, either successful or unsuccessful, for the constitutional convention, I speak freely.

Concerning the structure of state government, there is one point that was not touched at all in the program, and that, in my mind, is perhaps more important than any other. What-

ever the framework of government, we must finally come back to the administration of government by humans; by poor, peccable, corruptible, vain, futile, learned, benevolent, philanthropic, blessed mankind, and after all, and under all these forms the problem is to get the benevolent, the beneficent, the intelligent activities of the human mind in operation in the service and under the forms of government.

I do not say, as has been suggested by my greatly admired friend, the master of juridical expression, Judge Fowler, that the judiciary is greater or is less than all the other branches of the government; that the executive is greater or is less than all the others in dignity; but I do say that for power, the legislature is equal to all the rest together. Give me the power to enact a law, and I will take care of the way in which it is either interpreted or administered, if I have the power of continuing enactment. If the power of enactment is going to be continuous, there is nothing like the legislature, and about that you have said nothing.

What is the difficulty we are having in this state to-day? It was pointed out in advance, in 1846. It is, to quote Mr. Jessup, the "meticulous" division of legislative districts.

Before the constitution of 1846 in this state, and up to the present time in New Jersey, all of the legislative candidates in a county were placed upon a single ticket. That runs right up against another modern reform—we are oscillating between one and another—the short ballot. We could not elect thirty-six or forty members of the legislature from this district to-day, from this county to-day, without having a ballot longer than, I believe, is the coming fashion. That objection, however, would not apply in respect to the election of senators, of whom there would be only one-third as many. The senate is made up of the satraps of the state of New York. Each senator of the fifty-one has his own little district, and woe to the man, be he governor or anyone else, who undertakes to do anything affecting that district!

I hope that in the new structure of our state government, we may return to the system which we had in this state prior to 1846, namely, of electing four or five senators, or possibly six,

from larger senatorial districts corresponding perhaps in number to our nine judicial districts.

Prior to the constitution of 1846 there were thirty-two senators who became part of the court for the correction of errors and appeals. The senate was made up from eight distinct senatorial districts, out of which our present districts were later formed; from each of those districts four senators were chosen upon a single ticket. With the "short ballot" we might elect them, by what is known as the "ride and tie" system, in which one goes out one year, and the others one each in the three succeeding years. You can keep the ballot short and yet have the larger unit of representation. Unless something of that kind is done we shall never free the government, the executive, from the restraint imposed upon it by the particular representation in each small district of a personal political power.[1]

JACOB GOULD SCHURMAN

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The last speaker observed that what would work well in England might not work well here. I have wondered whether the gentlemen who advocate a closer connection between the executive and legislative departments of our government, in conformity with the English practice, have faced what none of them have mentioned,—I mean the circumstance that in this country both the executive and the legislator have fixed terms. Each now goes his own way to the end of his term, no matter if a conflict arises between them.

Under cabinet government, however, as it is practised throughout the British Empire, when a conflict occurs between the Cabinet as executive and Parliament, there is a dissolution of Parliament and an appeal to the people, who decide the question. Might not that difference in the constitutional methods and practices of the two countries have, conceivably, some

[1] Arguments in support of the plan by Governor Hoffman and the constitutional commission of 1872 will be found in Lincoln's *Constitutional History*, vol. II, pp. 484-487. See also p. 317 for Convention of 1867.

bearing on the questions which have been discussed here this afternoon?

I have been much interested also in the discussions referring to the judiciary. I trust that the judges do administer justice and that there is a practical identity between law and justice. The Roman jurisprudence described justice as "giving to each one his due—*suum cuique*." I do not think anyone short of Providence can perfectly do that. There is, therefore, it seems to me, in our best courts only the possibility of an approximation to the work of Providence, giving each one his due. With all respect to the distinguished speakers of the afternoon, I do think that while too much praise cannot be bestowed upon the Supreme Court of the United States, there is in the mind of intelligent people, as well as of uneducated people, a good deal of dissatisfaction with our state courts. There is a feeling, and in many cases a conviction, that substantial justice is often defeated by the interminable intricacies of proceedings and technicalities. I have wondered whether New York state is necessarily committed to a code which does not always work justice, and which falls short of the code that we had half a century ago. Might it not be worth while to consider whether in this state of New York we should not substitute for this lengthy code of procedure a simple act like the practice act of Connecticut?

I have so much respect for the judges that I do not like to see them hampered, as I think they are hampered, by the procedural laws of so many of our states. If there is an advantage in favor of the British system as compared with the system of the state of New York, I ask myself whether it is not perhaps due to the fact that Great Britain trusts her judges far more completely than we trust ours and imposes fewer restrictions upon them.

EXISTING CONSTITUTIONAL LIMITATIONS ON SOUND STATE FISCAL POLICY

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THE future fiscal policy of New York state will be an immediate concern of the coming constitutional convention. It is easy to advocate political or economic reform and to urge alterations in the administrative structure of the state government and its local agencies; but while sound and necessary reforms should not be estopped on the pretext of impending expense, they should not in turn be made the basis of maximum expenditures with minimum results. To the extent that the existing constitution will permit of administrative changes on a sound financial basis, it should be retained and strengthened in those particular provisions; and in so far as the present instrument is a "limitation on sound state fiscal policy," it should be broadened with a vision of the increasing functions of government, especially as to the management of municipal enterprises, during the generation in which the new compact is to be operative. Thus, in respect to its fiscal features, the new constitution must so check proposed state and local expenditures that deliberation will precede investments in capital accounts or for operative expenses; but it must likewise provide a method whereby the people of the state or its subdivisions may be aided, not retarded, in carrying out projects of accepted merit, once the merit has been determined.

The primary duty of the makers of the new constitution is to safeguard existing investments in public securities. There must be no impairment of present obligations in the name of progress. The letter of the bonds must be respected. This is the essence of sound law and good morals; but indeed it is more. When these state and municipal projects and enterprises are contemplated, which must receive the sanction of the

new constitution if that instrument is to be something other than the foe of true progress, it becomes evident that the sovereign and its local agencies will need increasing markets for public obligations during the generation ahead. Any proposed feature, then, of the coming constitution which seeks to alter the letter of these obligations, defeats the larger future purposes of the state. Strong as is the state, its creditors are given no fundamental protection such as is afforded to private creditors under the federal provision preventing the impairment of the obligation of contracts by state legislative action. Where the law of the obligation is weak, the moral sense must be keener. It follows from these premises that any sinking-fund or retirement provisions relating to bonds outstanding must be re-inserted in the new constitution as to those issues, even though the same clauses seem to be a limitation on the future fiscal policy of the state. It will require, indeed, the best thought of the convention to preserve the sanctity of present obligations, while devising a fiscal system for the benefit of a state and cities destined to enter upon larger undertakings during the present century. A consideration of some features of this task is the purpose of this paper.

The financial policy of this state may be found in section four of article seven and section ten of article eight of the constitution. To be sure, there are certain other sections as to canal and highway bonds, as well as provisions as to uniformity of taxation, but the essentials of the state's policy from a constitutional standpoint were incorporated in the clauses mentioned. These sections must be read together because, while one defines just what are permissible expenditures for the state government and its subdivisions, the other determines how these funds shall be secured and repaid. A change in one means an alteration in the other, or perhaps additions thereto. For the purposes of this discussion let us bear in mind these essential provisions of section four: (a) no debt shall be contracted unless authorized by law, (b) unless the bill authorizing the debt or expenditure provides for the levying of an annual tax sufficient to pay the interest and discharge the principal obligation within fifty years, and (c) with certain excep-

tions recited in preceding sections, unless the people have authorized the indebtedness. These clauses are followed by section five, providing for the separate investment of tax moneys raised for sinking-fund purposes and declaring the same to be inviolate.

Notice the relationship of the more important parts of section ten of article eight to the preceding provisions. It prohibits counties, cities and villages from loaning their credit to, investing in the stock of, or purchasing the bonds of corporations; nor can those local subdivisions incur any indebtedness except for county, city or village purposes; this is coupled with the proviso limiting such indebtedness to ten per centum of the assessed valuation of the real estate of the particular subdivision, except that water bonds of twenty years duration may be issued, even though the current obligations exceed ten per centum, or even though by such issuance the total indebtedness is brought above the constitutional limitation. This is followed by certain clauses whereby in given instances obligations of Greater New York, issued for specific projects, may be withdrawn or eliminated in the calculation of the debt limit.

The constitutional convention will be fulfilling its duty to the holders of present public securities, as well as providing a sound basis for the future, if it re-adopts these cited sections, in the main. This conclusion is true because the obligations have been issued under these sections; the courts have interpreted them in liberal fashion; and they have met the test of experience, especially from the standpoint of state, rather than local, fiscal policy. But there must be additions to these sections and some changes in detail, especially from the viewpoint of the cities, in order to provide a fiscal system which will promote municipal progress on a sound basis.

The specific change in public sentiment, since the present constitution was adopted in 1894, is not difficult to determine. In relation to the political subdivisions of the state, in distinction from the sovereign itself, the constitution limits expenditures to "city purposes" and then provides the method of borrowing and repaying the sums expended by these localities.

It has been the problem of the courts to determine just what were warrantable expenditures for local purposes. The courts of this state in meeting this problem have kept just far enough in the rear of public sentiment to impel deliberation, before expenditure, upon the part of municipalities. It is certain that during the last decade of this constitution, and with certain exceptions of a wholly local nature, the courts have broadened the meaning of "city purposes" as rapidly as the people and officials of the political subdivisions have shown their ability to administer enterprises made permissible thereunder.

But it is a notable fact in these days of municipal lighting plants and city-constructed subways, that the only "city purpose" mentioned on a state-wide scale in the original draft of this section in 1894 is the clause relating to the issuance of bonds for municipal water plants. It is true that even before 1894 certain cities had engaged in trading or business enterprises other than the conduct of water plants. But those departures were regarded with suspicion, and even the ownership of water systems was still apologetically excused by some on the ground of public health. But in the interval the man who opposes the public ownership of certain accepted public utilities has been placed on the defensive. The ownership of certain public services on a widening scale is a part of every municipal program. The need for broadening certain fiscal features of the constitution arose the day that the court of appeals decreed that Dunkirk had a right under the "city-purposes" clause to sell commercial lighting as an incidental part of the operation of a municipal lighting plant. This initial decision of the court, coupled with succeeding opinions involving some phase of similar city conditions, furnished the groundwork of that brief whereby Edward M. Shepard induced the court to sanction the construction of rapid-transit systems by the city of New York.

The framers of the new constitution, then, will be confronted by the arguments of two classes of municipal-ownership advocates. One class will urge that the constitution should sanction all that the courts have done; that the privilege of engaging in certain enterprises should be authorized specifically,

lest some turn in the tide of public sentiment prompt the courts to reverse their liberal and broadening interpretations of the "city-purposes" clause of the constitution; and they will want to add to this list, as first approved by the courts, and then sanctioned by the new constitution, certain other municipal activities. The writer has no quarrel with the intentions of these advocates. He favors an extension of municipal ownership, but he knows that its permanent extension must be on a basis of financial solvency authorized by the constitution. Thus he hopes that in the interests of genuine municipal fiscal progress, the convention will give heed to the other school of city thinkers, who urge and hope that the constitution will not bind the courts and the people by a specific enumeration of city purposes or projects, but that it will leave to the judiciary and to the people of given localities by some definite method to determine just what additional municipal ventures are permissible under the constitution as applied to the prevalent local conditions. Put this latter proposal to the test of practicability. What would be the measure of municipal progress to-day had the last constitution enumerated, in the then adverse state of public sentiment, just what municipal enterprises constituted "city purposes?" Has not more real progress been made, and on a sound, deliberate basis, by the courts countenancing from year to year, first one and then another municipal enterprise as within the "city-purposes" clause? And will not the true interests of municipal progress be served if the convention establishes a broadened fiscal system as a means of enabling cities to finance such enterprises as may be approved by the courts and the local taxpayers? There is no paradox in opposing the specific enumeration of city purposes and projects and then urging the incorporation of a particular fiscal system in the constitution, because it is a matter of business experience that bonds for either a smaller or a larger measure of municipal enterprise cannot be marketed unless the method of their issuance is general in scope and possessed of express constitutional sanction.

There will be an insistent demand for home rule for cities, in the coming convention. "Home rule" is an indefinite

term, and it can be made to suit the purposes of any visionary; but it is assumed for the purposes of this discussion that some measure of home rule will be granted by the constitution makers. But the financial aspects of home rule will be the most troublesome feature. It is certain that the convention cannot meet the expectations of home-rule advocates in that respect. The demand for home rule centers in the commission-government needs of cities. The latter is a movement of business men for business-like local government, and it should not be deprived of that merit by the convention's granting an unwise measure of home rule, especially as to the financial policies of municipalities.

The writer favors home rule, and he is convinced that this generation will witness a larger degree of public ownership by cities. But those who are for, and those who are against, an extension of municipal ownership should unite in insisting that the constitution place it on a basis of assured solvency. Those home-rule advocates who think that the existing debt limitation for cities should be abolished, and that the nature and extent of city indebtedness should depend upon the wisdom or prejudices, or both, of local taxpayers, no less than those municipal ownership advocates who think that the "city-purposes" clause should be broadened so as to include by specific enumeration a large number of additional municipal enterprises, or those who want the taxpayers of a city privileged to determine by a referendum what are "city purposes" and how the acquirement and operation of plants thereunder shall be financed, not only are defeating their own ends, but are proving themselves to be foes of municipal progress.

The home-rule advocates must remember that cities are governmental agents and not sovereigns; that those agents are without inherent rights, but enjoy privileges in the discretion of the state, and by concession of the whole people when power is delegated to local subdivisions by the ratification of a constitution. These home-rule advocates may point to the fact that the cities of England issue obligations for a large variety of municipal projects and without the protecting or restraining hand of a written constitution; but they fail to recall that each

bond issue requires the authorization of Parliament, except where it is for those ordinary purposes which may be approved by the local administration board. Certainly the cities of New York have enjoyed a larger and safer measure of local control under the constitution than if the legislature had been empowered to determine what enterprises they should acquire and how they should finance their acquirement. Either the English legislative or the American constitutional method must be followed in determining the fiscal policies of our cities; and the former is justified only where the legislative body, like Parliament, is the supreme arbiter of the state and the interpreter of its constitution.

Obligations of the cities of New York are now outstanding under constitutional sanction. The same instrument declares invalid any bonds issued outside its purview. These obligations have been taken by city creditors in good faith, and because of the constitutional assurance that the present and future issues would be limited. The increase in the assessed valuation of local real estate is made the measure of bond-issuing possibilities. This is the truest standard of municipal finance. To sweep away this standard, even under the guise of home rule, is a fraud. There is nothing sacred about a ten per cent limitation, but some definite limit of municipal indebtedness, in relation to assessed valuation, should be considered sacred. Under and because of this existing limitation, municipal securities have been legalized as investments for savings banks in several of the states and for the trustees of estates. It is certain that the withdrawal of this limitation and the vesting in cities of the power to determine the purpose and extent of local indebtedness, will be followed by the repeal of the acts authorizing these investments. But that will not be the final effect. The municipal-ownership advocates as a class favor home rule; but it will not be possible to market the city securities needed in any extension of city ownership unless there are constitutional clauses limiting the possible indebtedness. If successive bond issues await only the favorable action of a locality, funds will not be available for public ownership on the scale contemplated by some. Those who

want a broadening of the meaning of "city purposes" should be the very ones to insist that these projects be placed on a business basis.

Nor should the sinking-fund provisions of the coming constitution be ignored. No bond should be issued without automatic provision for its retirement. The provision of the constitution limiting the years for which the state or cities may issue obligations should remain. A yearly tax should be levied to meet a part of the principal of each bond issue. The accumulation of large sums out of current tax levies, to constitute a sinking fund with which to retire a bond issue, in the distant future, is a fruitful cause of public corruption. It seems that the states and cities should reserve the right to retire a proportionate part of a bond issue each year.

And there are some reasons why the latter should be a positive requirement in connection with the obligations issued by cities for the purchase of business enterprises. In fact, in redrafting the fiscal features of the new constitution, it will be well for the convention to keep in mind the distinction between bonds issued for city halls, sewers and pavements, which do not yield a revenue, and for which service no charge may be made, and obligations authorized for the purchase of water and lighting plants, or the like, which yield a return and for whose service to private citizens charges may be made. City demagogues have thriven by eliminating sinking-fund and depreciation charges from the calculations of municipal-ownership expenses, and then convincing the people that this type of vicious and indirect subsidy is in their interest. The placing of city-owned systems under the jurisdiction of the public service commission has tended to stop this practice. If bonds issued for the purchase of property, in contradistinction to obligations issued in connection with the exercise of a local governmental function, were retired proportionately each year it would be necessary to calculate the sinking-fund charge with precision, and the protests of the taxpayers would prevent those moneys from coming out of the annual levy, rather than out of the revenues of the particular property. Moreover, by careful investigations and adjudications the average life

of a particular type of municipal system may be determined, and no bond issue should be permitted for a period longer than the life of the plant.

All these things cannot be inserted in a constitution. The constitution must be considered as the embodiment of necessary fiscal principles. These items are mentioned to emphasize the conviction that the next constitution must delegate large discretionary powers to the legislature in relation to state fiscal policies and city government.

And if the state is to hold the cities to a high standard of fiscal policy; if the cities are to be granted home rule, but subject to debt limitations under the constitution; if the localities are to be allowed to join with the courts in giving a broader meaning to permissible "city purposes" from year to year, as regards municipal-ownership activities, then should there not be some automatic method which will to a partial extent grant to those cities which conduct their systems efficiently a larger measure of home rule, than to those which burden the taxpayer by poor service or by requiring tax levies to maintain their plants? This method can be found; but it cannot be applied unless the constitution draws the distinction, as previously suggested, between obligations issued for governmental purposes and those required for the purchase of quasi-business systems. The same rule should not apply to a bond issue for a city hall and a revenue-producing water plant. One must be paid for by the taxpayer and the other should be paid for by the consumer. In fixing city debt limits, the new constitution should separate the two and make provision accordingly. As to bonds for city-hall purposes and the like, the clause should be definite and inelastic; but as to obligations for water, light and similar municipal plants, the provision should be elastic and discretionary. As a matter of public credit, all bonds issued, in the first instance, and without respect to the principle underlying the suggested separation, should be a municipal lien and be counted against the debt limit. But it is urged that the constitution should empower the legislature to permit a city which conducts a particular enterprise with success and which provides for the sinking-fund and depre-

ciation charges without resort to taxation, for a given period of years, to establish those facts before a commission, or in an appellate court proceeding and then to withdraw that bond issue from the calculation of the permissible city debt limit. This enables a city to acquire other enterprises when it has demonstrated its capacity to conduct existing systems.

In the investigation of the financial features of several state and city enterprises in the United Kingdom the writer found that in many instances the public service systems were purchased, subject to existing trust mortgages and bonds. This simplified the acquirement of these properties, and the method has been successful; but it does not follow that it should be adopted in this state, even though it is now being tried in the cities of western Canada. The plan may be permitted, or not, in England or the Dominion, because an enabling act must be obtained from Parliament or the provincial legislature. This requirement permits the legislators to pass upon the desirability of taking over a public service system, subject to existing mortgages, instead of issuing city bonds for the whole purchase price, upon the merits of each proposition; but where, as in New York, it is necessary to devise a uniform method of municipal financing, and insert it in a constitution, this plan is not feasible. The advantages of the plan may be gained here by withdrawing from the calculation of the debt limit those bonds issued for plants paying a revenue for successive years.

No new constitution may be deemed a liberal instrument, which does not enable the state and its subdivisions to absorb those values accruing through the exercise of governmental functions, and community effort. The "excess-condemnation" amendment was a step in that direction. A constitution which embodies a sound state fiscal policy must provide not only for efficient and inexpensive administration; but it must assure to the people the profits accruing from an extending ownership of systems inherently quasi-public in their nature and service, coupled with payment into the treasury of those franchise and site values which are enhanced by the efficiency of the government and by its increasing ownership of public utilities.

THE CIVIL SERVICE CLAUSE IN THE CONSTITUTION

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THE civil service reform movement in New York state may be said to have had its beginning on May 11, 1877, when a call was issued for the organization of an "Association for the promotion of Civil Service Reform." This association devoted its efforts to the federal as well as to the state service, and helped to secure the passage of the Pendleton civil service bill on January 16, 1883. Four months later a state civil service bill prepared by this association received the approval of Governor Cleveland, who designated as commissioners President Andrew D. White of Cornell University, Attorney General Augustus Schoonmaker of Ulster County, and Henry A. Richmond of Buffalo. Mr. White finding it impossible to serve, Hon. John Jay was appointed in his stead. The eighth section of the state law authorized the mayor of each city in the state having a population of 50,000 or upwards to establish a merit system of municipal appointments. Mayors Low of Brooklyn, Scoville of Buffalo and Edson of New York subsequently issued rules in accordance with the civil service act.

For the first two years the system was sympathetically and effectively administered as an aid to good administration. This record did not continue, however, and during Governor Flower's administration the situation required a thorough investigation by a committee of the legislature. This legislative inquiry showed that in New York state the operation of the civil service law had been almost nullified by bad administration, while it was demonstrated beyond all question by the testimony of executive officers of the United States and Massa-

chusetts civil service commissions that elsewhere the success of the merit system had been unqualified.

Closely following the senate investigation came the adoption by the constitutional convention of 1894 of the following civil service amendment:

> Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

The Civil Service Reform Association had been engaged for several months before the convention met in promoting a movement to bring to the attention of the delegates the importance of this recognition of the principle of civil service reform. In recognition of the general demand for careful consideration of the subject, President Joseph H. Choate appointed a committee on the civil service, and a series of hearings was accorded to the organized advocates of civil service reform. The section was reported and came up for consideration in the closing days of the convention. There was a spirited fight over the adoption of the amendment. Some of the delegates were opposed to the merit system in every way; others objected to putting such matters into the constitution, claiming that they fell only within the province of ordinary legislation. The amendment was finally carried by a vote of 97 to 54. Of the Republican delegates, 58 voted in its favor and 41 against it; of the Democrats, 39 voted for and 13 against it. A strong speech by Elihu Root of New York is credited with holding a majority of the Republican vote to the affirmative side, as a good many delegates of that party manifested a disposition to break away.

Two features of the amendment as finally framed were added to it after the form agreed on by the Civil Service Reform Association and the civil service committee of the convention had been reported,—the application of the section to counties, towns and villages, and the veteran preference clause. The former cost the amendment 40 Republican votes, and it is believed that had the amendment been put on its passage without that feature the vote would have been very nearly unanimous. The ratification of the constitution followed in November of 1894, and New York became the first state of the union to embody the principle of civil service reform in its organic law. In 1912 Ohio followed New York's example by putting a similar civil service clause (except that the preference of veterans of the Civil War was omitted) into its constitution by a popular majority of more than 100,000.

One of the practical results of the adoption of the constitutional provision was the extension of the civil service rules to cover the 1200 employes of the public works and prisons departments who had been exempted since 1887 under a decision of the court of appeals holding it unconstitutional to vest the power of appointment elsewhere than in the official heads of the departments in question. These employes formed at that time one-fourth of the state civil service. During the administration of Governor Morton a thorough revision of the rules and classification was made, which greatly reduced the number of exempt and non-competitive places.

Governor Black, who succeeded Governor Morton, declared that in his judgment "civil service would work better with less starch." Late in the session of 1897 the "Black civil service bill" appeared, which provided as radical a piece of reactionary legislation as could have been devised. The bill required that in all examinations for the state, county and municipal services not more than fifty per cent might be given for "merit" and the rest of the rating, representing "fitness," was to be designated by the appointing officer. While it was clearly shown that the passage of the bill would wreck the merit system, yet, as a party measure, it was placed on the statute books. The results of the operation of the Black civil

service act showed that in the larger cities department officers, with few exceptions, continued the old system of designating the civil service commissions to act as their examiners for "fitness" as well as for "merit." Wherever the act had been permitted to go into full operation in accordance with its spirit it was shown that the competitive scheme as understood by the framers of the constitution in 1894 had been destroyed, while a cumbrous and unsatisfactory system had been set up in its stead.

In 1899 all this was changed. The "Black act" was repealed and its operation in the state departments discontinued. A new law, general in its application and superior to any civil service statute theretofore secured in America, was enacted. The passage of this bill relieved an anomalous and confusing situation. As a result of the vicious legislation under Governor Black four systems of widely differing character had come into existence by January 1899. New York city had its charter rules, the state departments were conducted under two adaptations of the Black law, and in the smaller cities the plan of the original law of 1883 was followed. Owing to the firm attitude of Governor Roosevelt, a complete revision of the law was accomplished. Seventeen previous statutes enacted within the period from 1883 to 1898, including the Black law, were repealed and superseded. The state commission, after recasting its own system, was authorized to prescribe rules for the larger counties as rapidly as proved practicable. It was also given greatly increased supervisory powers over municipal commissions. For the purposes of investigation of the administration of the law and rules it was given all the power of a legislative committee. The law provided no substantial safeguard against the unwarranted removal of competent employes, but it was far superior to the statutes it repealed, and its passage was one of the valuable achievements of Governor Roosevelt.

Since 1899 the classification has been extended to the larger counties and villages, resulting in increased efficiency in those services.

The law in the hands of effective and sympathetic administrators has worked in the interest of good administration. In

the hands of its enemies the constitutional provision has been the bar which has prevented the complete debauchery of the service. The clause is sufficient to protect the essential elements of the merit system.

So much for the history of the provision. What are its essentials, and the principal suggestions which will probably be made for amendments? The provision reads as follows:

> Appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive.

This provision starts out with a general statement of principle applying to all appointments and promotions, *i. e.*, they shall be made for merit and fitness. It then proceeds to provide that merit and fitness shall be ascertained by examination, if practicable, and by the competitive method, if this is further practicable. In other words, it recognizes that examinations for appointment and promotion are not necessarily applicable to all positions by inserting the words "so far as practicable."

The provision is properly elastic. It provides for improved methods of examination for testing competency by which appointments under the competitive system formerly not practicable may, through the use of these methods, become practicable. It is brief in its statement, in accordance with recognized principles in drafting a constitution, and yet is comprehensive in applying to the state and all civil divisions thereof and to all appointments and promotions.

The principal suggestions which may be made for amendments to this provision are four in number:

1. An extension of the competitive principle to cover all appointive offices and employments. This means that all public officers and employes other than those elected by the people, including on the one hand heads of departments, election officers, appointive judicial officers, private secretaries, *etc.*,

and on the other mere laborers, shall be appointed as the result of some form of competitive examination. No half-way step between this broad proposition and the present constitutional provision for competition so far as practicable seems possible, for it is impracticable satisfactorily to name or specifically describe in the constitution the positions which shall be exempt. Moreover, there is at present no general agreement as to how far competition should be extended. Some civil service reformers believe, as suggested, that all positions should be filled as the result of competitive examination. Others just as sincerely believe that the higher and more responsible offices cannot be successfully filled by any form of competitive examinations yet devised. All the friends of the merit system desire to see the scope of competition extended as far and as fast as is practicable, and most of us hope that in time all public officers and employes who are not engaged in determining, as distinguished from executing, the policy of an administration, may be brought within the competitive principle. Great progress is being made in devising and conducting competitive examinations for very important and responsible positions, and the success achieved in that direction assures us that it will be found practicable in the future to extend the scope of competition far beyond the line now reached. For the present, however, the writer believes that it will be wiser to leave the constitutional provision as it is, especially as it has been settled by the courts that the civil service commission has very broad discretion in determining that competition for any particular position is practicable, and that the courts will not interfere with the exercise of its discretion unless it is "palpably illegal."

2. An extension of the preference now conferred upon veterans of the Civil War to veterans of the Spanish War and other minor wars and military expeditions, such as those to China and Mexico, and possibly to the militia and to volunteer firemen. Civil service reformers are opposed to the creation of any privileged classes in the civil service, on the ground that it is unjustifiable and detrimental to good administration. The interests of the service itself should be para-

mount to the personal interests of any class, however deserving of public recognition, and the interests of the service require that persons classified alike under the civil service law should be treated alike. We would not deny any proper recognition to those who fought in the wars of the country, but this recognition should take some other form than preference in the civil service, which makes for a privileged class and discriminates against other classes of employes equally competent to serve the state. It is true that Civil War veterans now have a preference in appointment and promotion. The history of that preference is interesting. Undoubtedly, it is not in accordance with the true principles of civil service reform. But those who fought in the defense of our country over 50 years ago had extraordinary claims to the country's gratitude. They were favored for office before the institution of the merit system, and the laws establishing that system simply continued the then existing preference. The Civil War veterans are old men, and do not take examinations in such numbers as to interfere seriously with the competitive system. It would be ungracious and have little effect upon the service to take now from these old veterans the preference they have so long enjoyed. This is not true as regards veterans of the Spanish War and other minor wars, or the militia and the volunteer firemen.

In giving to those who have rendered military service a preference in appointment which virtually amounts to an opportunity to monopolize the great mass of public positions, the way is open for further class distinction. Legislation creating class distinctions and preferences, especially based upon military service, is not consonant with the ideals of this nation, whose founders declared against the military being superior to the civil power and for equality of opportunity for all men.

If this preference were granted, persons who were not preferred would scarcely find it worth while to compete in the examinations, and the civil service would lose its representative character and be confined to a military office-holding class. The proposal to give this preference to veterans is based upon a fundamentally unsound theory of public office. Public office

should not be regarded as a gratuity, but as an opportunity for service to the community by those most fitted to perform that service. To the extent that public office is an honor and means of livelihood all should enjoy equal opportunity to compete to gain such honor and livelihood.

Thse who serve the nation in time of war deserve well of a grateful country. If this state wishes to reward in a fitting manner those citizens who have represented the state in time of national peril there can be no objection raised. It cannot be called, however, a fitting reward of patriotic service to grant to those who have rendered military service the privilege of impairing its civil service.

If preference were granted to these veterans it would serve as an entering wedge for still further extension of the preference plan. Members of the state militia, many of whom have served in riots and all of whom hold themselves ready for service in war, claim to be equally entitled to a preference with those whose brief war service was only in camps on home soil. There are also the volunteer firemen, who base a claim to preference on the services they have rendered to the public. Indeed, in previous legislatures resolutions amending the constitution have been introduced proposing a preference for these various classes. The extent to which these preferences might go, once a start was made, is shown by the bills introduced in previous legislatures proposing a preference in appointment to civil offices for ex-members of the legislature.

3. Some provision for the protection of officers and employes against removal. This is a problem for the legislature to solve, and has no place in the constitution. The organized advocates of civil service reform are absolutely opposed to any introduction of this principle into the constitution. It is not in the interests of the public service that obstacles should be put in the way of the removal of inefficient or undesirable public servants. The departments ought not to be clogged with persons whom it is exceedingly difficult to remove even if inefficient, and the heads of departments ought not to be unduly hampered in the administration of their offices.

The early supporters of the merit system started out with

the doctrine, so epigrammatically announced by Mr. Curtis, that if the front door was properly safeguarded the back door would take care of itself; in other words, where the merit system was in force and appointments had to be made from a competitive eligible list there would be no necessity of restricting the head of the department in the exercise of the power of removal. Experience has shown that this view is not entirely correct, and various efforts have been made to solve the problem.

The first civil service commission in this country recommended a procedure requiring reasons to be given and an opportunity to reply, and this recommendation was repeated frequently afterwards. In the federal service in 1897 a new rule was issued by President McKinley requiring a statement of reasons and an opportunity to reply in writing before dismissal. A similar procedure was provided for in the New York charter. Members of the classified service in the police and fire departments, however, acquired a right to trial, and this has been slowly extending to other departments, accompanied with a greater or less right to review of removals in the courts. Veterans of the Civil War as a preferred class acquired years ago a right to trial and review in the courts by *certiorari,* which has been extended to veterans of the Spanish War and veteran volunteer firemen. Civil service reformers in Chicago drafted, and have always defended, a provision of their law for a hearing before the civil service commission itself on removals, and some other western commissions have gone far in the same direction.

Every year in New York the legislature is the battle ground where advocates of court review for dismissed employes meet representatives of the Civil Service Reform Association, who oppose such legislation as fatal to efficiency and wholly wrong in principle. New York city civil service reformers believe that the passage of laws granting court review has come through the fact that administrative tribunals are not recognized in this country, and through failure to perceive that removal is as much an administrative function as appointment. The New York Civil Service Reform Association has approved

a bill placing removals in the hands of an administrative trial board under the jurisdiction of the civil service commission. On the other hand, the employes and heads of departments, regardless of party affiliation, have declined to approve this legislation.

All this goes to show that the best thought in the country is divided with reference to an effective and equitable solution of this important problem. In the presence of such a situation it would be unwise to attempt to solve the problem by some hard and fast provision embedded in the constitution. It must be largely a matter of careful experiment, and it would be much wiser to leave to the legislature its solution by trying the various plans, such as the administrative board under the jurisdiction of the civil service commission.

4. Provisions for civil pensions. This is a very broad and difficult subject, upon which there is as yet no general agreement. The friends of the merit system believe that it is not a matter for constitutional regulation, but should be left to the legislature and to the municipalities. Even before the legislature gives serious consideration to this problem a thorough investigation should be made to determine whether a retirement system can be devised which, without imposing an undue burden upon the taxpayers, will tend to increase the efficiency of the public service through caring for the old age of those who have served long and faithfully. A system of retiring annuities embodying correct principles can be made to rest upon a sound actuarial basis. At the present time, however, the data are almost wholly lacking for devising a sound plan for retiring at reasonable cost to the taxpayers the civil employes already in the service. Such investigations as have already been made into the conditions of employment in the federal service lead to the conclusion that a more thorough investigation is needed. This inquiry should ascertain and set forth accurately the facts essential to determining the cost to the taxpayers of establishing upon a sound actuarial basis a retirement system applicable to employes already in the public service. We need to know, for example, the length of service and the age of each employe, his salary at entrance, all

increases since, and his present salary. It is not necessary to emphasize the unwisdom of enacting any retirement system into law without the prior official collation and publication of such necessary statistical information. We have not this information at hand and, inasmuch as this matter is still controversial, it ought to be left to the legislature to provide for as the result of careful and intelligent inquiry and experience.

There is one other point which should be borne in mind in framing amendments to the present constitution; that is, the danger that the broad terms of some "home-rule" amendment may interfere with the present system of administering the civil service. Under the present system, which has obtained from the beginning in 1883, the state civil service commission has general supervision and some control over local municipal commissions, while the latter have the general right of initiative in local administration and entire control of details. This is as it should be, for the merit system is a state system founded on a general constitutional provision and a general state law. Enforcement of the constitutional provision and uniformity in administration are secured through the powers vested in the state commission. Supervision by the state commission is the only real safeguard provided in this state against the turning over of the control of the administration of the civil service law in cities to the exigencies of local politics. It provides an absolutely necessary check against non-enforcement of the law by local authorities and against falling below the standards established by the state commission. It acts not merely as a restraint, but also as a much needed support to the municipal commissions in times of stress when they are subjected to undue pressure by local authorities. In other states, such as Massachusetts and New Jersey, the law does not provide for local commissions, but places the control of the entire system in the hands of one general state commission. In New York the combined system of state and local commissions, with general supervision and control in the hands of the state commission, has worked well, and we believe it should not be changed. Not only should no change in this respect be made in the civil service clause of

the constitution, but care should be taken that no other clause of the constitution should indirectly take from the state civil service commission its present general powers over municipal commissions.

To sum up, generally, the present civil service provision of the constitution has worked satisfactorily and well; it is short and simple, and yet elastic; it embodies general principles and avoids details; it has been construed often by the courts, and its construction and meaning are definitely settled. It should be left as it is, and retained in the new constitution without amendment.